No. 00-9280-CSY Title: William Arthur Kelly, Petitioner
v.
CAPITAL CASE South Carolina

Docketed: Court: Supreme Court of South Carolina
April 5, 2001

Entry	Date	Proceedings and Orders
	Apr 5 2001	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 5, 2001)
	May 7 2001	Brief of respondent South Carolina in opposition filed.
	May 9 2001	Reply brief of petitioner William A. Kelly filed.
	May 22 2001	DISTRIBUTED for Conference of June 7, 2001
	Jun 8 2001	Record filed.
	Jun 11 2001	REDISTRIBUTED for Conference of June 14, 2001
	Jun 18 2001	REDISTRIBUTED for Conference of June 21, 2001
	Jun 25 2001	Petition GRANTED. SET FOR ARGUMENT November 26, 2001. **********
	Jul 2 2001	Motion of petitioner for appointment of counsel filed.
	Jul 3 2001	DISTRIBUTED. September 24, 2001 (page 31)
	Jul 20 2001	Joint appendix filed.
	Jul 20 2001	Jt. appendix in two volumes.
	Jul 30 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 23, 2001.
	Aug 20 2001	Brief of petitioner William A. Kelly filed.
	Sep 17 2001	Order extending time to file respondent's brief on the merits to and including October 17, 2001.
	Sep 25 2001	CIRCULATED.
	Oct 1 2001	Motion for appointment of counsel GRANTED and it is ordered that David I. Bruck, Esquire, Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
	Oct 17 2001	Brief of respondent South Carolina filed.
	Nov 9 2001	Reply brief of petitioner William A. Kelly filed.
	Nov 26 2001	ARGUED.

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FILED
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CLERK

00-9280

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. 00-___

WILLIAM ARTHUR KELLY,

PETITIONER.

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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Capital Case

QUESTION PRESENTED

Whether the South Carolina courts' refusal to inform petitioner's sentencing jury that he would never be eligible for parole if the jury sentenced him to life imprisonment rather than to death violated Simmons v. South Carolina, 512 U.S. 154 (1994).

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The opinion of the South Carolina Supreme Court affirming petitioner's conviction and death sentence is reported as State v. Kelly, 540 S.E.2d 851 (S.C. 2001), and is reprinted in the Appendix to this petition at pages 1-18.

JURISDICTION

The judgement of the South Carolina Supreme Court was entered on January 8, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law . . . ."

2. It also involves S.C. Code Ann. §§ 16-3-10 et seq. (2000 Cum. Supp.), which code sections are reprinted in the Appendix to this petition at pages 21-24.

STATEMENT OF FACTS

On January 1, 1996, a South Carolina statutory amendment took effect that abolished parole or other forms of early release for all prisoners convicted of murder. No. 83, § 10, 1995 S.C. Acts 557, codified as S.C. Code § 16-3-20 (Supp. 1999), App. 21-24. In

capital cases, the same legislation limited the sentencing jury's options to death and life imprisonment without possibility of parole, so long as the jury determined the defendant to be death-eligible by finding the existence of one or more statutory aggravating circumstances. Id.[1]

Just five days after the no-parole amendment took effect, 17-year-old William Arthur Kelly killed a former co-worker at a Kentucky Fried Chicken restaurant during the course of a robbery. He confessed to the crime, and was duly convicted in a South Carolina state court of murder, kidnaping, armed robbery, and possession of a knife during the commission of a violent crime. The facts of the crime, as summarized by the South Carolina Supreme Court, are as follows:

> On the night of January 5, 1996, police officer Stephen Clare drove by the Batesburg KFC and noticed in the parking lot a car running with the driver's door open. Knowing that it was after the restaurant's usual closing time and recognizing the car as belonging to Shirley Shealy, the manager of the KFC, Officer Clare pulled in to investigate. Officer Clare discovered Shealy's body in the KFC; her hands were taped behind her back, and money was strewn all over the floor and stuck to her bloody body.
>
> Kelly, a former KFC employee, had visited the KFC earlier that day. After interviewing KFC employees, Batesburg-Leesville Chief of Police William Oswald attempted to locate Kelly. On January 8, 1996, Kelly's mother called Chief Oswald and told him that Kelly was in Lowell, Massachusetts. Lowell police detectives

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[1]This Court recently considered these amendments to the South Carolina capital sentencing scheme in Shafer v. South Carolina, 532 U.S. ___ (2001).

found Kelly at his sister's residence in Lowell. Kelly, who was seventeen years old at the time, was advised of his *Miranda* rights and made a statement to the detectives admitting that he killed Shealy and stole money from the KFC. Kelly had in his possession money stained with Shealy's blood. In addition, the Lowell detectives retrieved Kelly's bloodstained clothing from his car.

The state sought the death penalty. At the sentencing hearing that followed petitioner's conviction for murder, the prosecution called a series of correctional officers and a former cellmate to establish that petitioner was a dangerous and remorseless prisoner who posed a high risk of escape. By these witnesses' testimony, the state sought to prove the following facts:

- while awaiting trial on the present charges, petitioner refused an order to go into his cell, and backup correctional officers had to be summoned to force him back into his cell, R. 1666;
- petitioner was charged with attempting to escape after it was learned that the mortar around a cinder block in his cell had been scraped away, R. 1713;
- on five occasions, petitioner had talked with a former cellmate about escaping from jail, R. 1741;
- petitioner had on more than one occasion made a "shank," a sharp knife-like tool, which is commonly used as a weapon in jail, R. 1742-43;
- petitioner had devised a plan to take a correctional officer hostage with a shank, and had gone so far as to call the correctional officer to his cell while he held a shank behind his back; R. 1743-44;
- petitioner was searched by a correctional officer who found a toothbrush with a sharp metal object melted into it in petitioner's possession, R. 1760-61, and;
- petitioner behaved in an aggressive manner around other inmates. R. 1770.

After resting its case in aggravation, the prosecution elicited the following additional facts through cross-examination of a defense psychologist:

- petitioner told a mental health counselor that he obsesses about killing people, R. 1927;
- petitioner was part of a prison gang, R. 1948-49; and
- petitioner tortured and killed small animals while growing up. R. 1958-59.

During the charge conference just before closing arguments, petitioner's counsel requested, on the authority of Simmons v. South Carolina, 512 U.S. 154 (1994), that the judge read to the jury the following portion of S.C. Code Ann. § 16-3-20(A):

> "[L]ife imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

Defendant's Request to Charge Number 1, R. 2107, 540 S.E.2d at 856. The prosecutor opposed the request, and asserted that petitioner was not entitled to a Simmons instruction on parole ineligibility because the prosecution was "not going to argue future dangerous[ness]" in its penalty phase summation. R. 2000-01. The prosecutor further explained, "I am not going to talk about this defendant posing a future danger to the public and to society. . . . I didn't put up any psychiatrist or psychologist that said this man will kill again in the future." R. 2002. The trial judge

agreed with the state, ruling as follows:

> The argument [defense counsel] make . . . that the state has made future dangerousness an issue in this matter. I don't believe that the issues that have been presented by the state insofar as the testimony from the prison guards et cetera are such that causes this court to determine that future dangerousness has been made an issue. I think those are issues that go to the defendant's character and characteristics. As a result, I'm going to deny defendant's request for charge number one.

R. 2007.

Defense counsel next requested, based on the court's finding that the state had not made an issue of petitioner's future dangerousness, that the court so instruct the sentencing jury. Specifically, counsel requested an instruction that included the following:

> I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may not consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during your deliberations as to the sentence to be imposed.

Defendant's Proposed Instruction No. 2, R. 2108, 540 S.E.2d at 859. The state opposed this instruction, and despite defense counsel's urging that the jury would infer petitioner's future

dangerousness "from the evidence that the state itself put before the jury" absent such an instruction, the trial judge refused to give it. R. 2009.

The prosecutor then delivered his summation. Notwithstanding his assurance that the state would not "argue" petitioner's future dangerousness, he proceeded to characterize petitioner as worse than a serial killer, as a butcher, and as "Billy the Kid."[2] In an effort to minimize the significance of the fact that petitioner was only 17 and had no prior criminal record, the prosecutor argued, "You know something, a person that commits an uncharacteristic and an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal." R. 2029. The prosecutor informed the jury that petitioner's murderousness was an innate and immutable fact: "He was going to kill. It was just a matter of when. Whether he was 17, 27, or 37." R. 2030. Later in his closing, the prosecutor repeatedly referred to petitioner as "Bloody Billy, the butcher of Batesburg." R. 2035. He went on to explain what made petitioner so dangerous: "What did his own witness say. He doesn't have any mental illness. He's intelligent. He's not retarded. He's quick-witted. Doesn't that make

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[2] See Carl R. Green and William R. Sanford, Outlaws and Lawmen of the Wild West: Billy the Kid (1992). Henry Antrim, also known as Billy the Kid, was a notorious Western outlaw and gang leader known for his boyish appearance and extreme ruthlessness. He killed his first victim when he was seventeen, id. at 11, and eventually murdered at least nine people. Id. at 30.

somebody a little more dangerous ---". R. 2037 (emphasis added). Petitioner promptly objected, telling the judge that the prosecutor had "stipulated dangerousness is not an issue," whereupon the prosecutor changed course to suggest that the dangerousness he had just referred to was "---for this lady, this crime on January 5th, doesn't that make him more unpredictable for Shirley Shealy. When you let your guard down and they stab you in the back. That's what we have here." R. 2037. The prosecutor reminded the jury of petitioner's attempted escapes, R. 2038-39, and his plan to take a correctional officer hostage, R. 2039-40, and invited the jury to draw from this evidence the inference that "shanks will be shanks. And murderers will be murderers. And he is the cold-blooded one right over there." R. 2040. Finally he reminded the jury that petitioner had bragged and joked about his crimes while in jail, R. 2043 and concluded with, "Folks, if you don't give him the death penalty, anything less will be a final stab to the memory of Shirley and Sidney Bruce." R. 2044.

In keeping with his pre-argument ruling, the trial judge gave the jury no instructions concerning the non-existence of parole release for murderers sentenced to life imprisonment, stating only that "the terms 'life imprisonment' and 'death sentence' are to be understood in this [sic] ordinary and plain meaning." R. 2069.[3]

[3]Despite this Court's determination in Simmons that such a "plain meaning" instruction does not protect capital defendants against jurors' prejudicial misconceptions concerning parole, 512

While declining to further define life imprisonment, the trial judge did advise the jury that "the death penalty . . . in this state is by electrocution or lethal injection." R. 2068. Following the sentencing instructions, defense counsel renewed her objection to the trial court's failure to charge the jury regarding petitioner's ineligibility for parole, or in the alternative, to charge the jury that petitioner's future dangerousness was not at issue in this case. R. 2082. The judge refused to further instruct the jury, which returned with a binding recommendation of death after deliberating for 43 minutes. R. 2084-87.

On appeal to the South Carolina Supreme Court, petitioner renewed his argument that Simmons v. South Carolina entitled him to advise the jury of his ineligibility for parole had he been sentenced to life imprisonment. State v. Kelly, Brief of Appellant at 2-13; Reply Brief at 3-5. In response, the state relied in part on a since-invalidated rationale for avoiding the effect of Simmons: namely, that Simmons had been rendered inapplicable to South Carolina's capital sentencing scheme by the 1995 statutory amendments. Brief of Respondent at 19-27. The state also argued

U.S. at 169-170 (plurality opinion), 177-78 (O'Connor, J., concurring), the South Carolina Supreme Court continues to require that the instruction be given. Compare State v. Southerland, 447 S.E.2d 862 (S.C. 1994) (Simmons charge not required because prosecutor agreed not to "argue" future dangerousness) with Southerland v. State, 524 S.E.2d 833 (S.C. 1999) (appellate counsel ineffective for failing to raise denial of "plain meaning" instruction).

that the prosecutor had not raised future dangerousness outside of prison as an issue, and that petitioner was therefore not entitled to a Simmons instruction. Brief of Respondent at 27-39.

With one justice dissenting, the South Carolina Supreme Court accepted both of the state's arguments, holding that the record did not satisfy the "future dangerousness" requirement of Simmons, State v. Kelly, 540 S.E.2d 851, 857 (S.C. 2001), and also that the 1995 amendments placed South Carolina's sentencing scheme outside the ambit of Simmons in any event. Id., at 857-58. With regard to future dangerousness, the state court majority first opined that the state's evidence regarding petitioner's attempted escapes, his frequent talk about escaping, and his possession of a shank "simply is not the type of future dangerousness evidence contemplated by Simmons." Id. at 857. While acknowledging that the state had "clearly presented . . . evidence of Kelly's future dangerousness to others within prison," id. at 859, the state supreme court held that this evidence only placed in issue his ability to adapt to prison life, and did not invite the jury to weigh "what is considered 'future dangerousness' under Simmons, i.e. a future danger to society." Id.

To petitioner's argument that the prosecutor had also raised the issue of petitioner's dangerousness directly in his closing argument, the state court responded that "the State consciously avoided any implication of future dangerousness," and did not

explicitly ask the jury to impose the death penalty based on petitioner's future danger to society. Id., at 857. For these reasons, the state court concluded that future dangerousness "was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument." Id.

Petitioner also raised on appeal the trial court's refusal to instruct the jury that petitioner's future dangerousness was not an appropriate sentencing consideration. Brief of Petitioner at 14-16. The state argued that such an instruction would have been improper in this case, because the prosecutor "did not stipulate to the factual issue that future dangerousness was not in issue; instead, he merely agreed not to argue future dangerousness in closing." Brief of Respondent at 42. The South Carolina Supreme Court agreed with the state, holding that the proposed instruction would have improperly precluded the jury from considering the evidence presented by the prosecution to show that petitioner posed a danger within a prison setting. 540 S.E.2d at 859.

On February 7, 2001, the South Carolina Supreme Court granted a motion for stay of execution to allow the filing of this petition for writ of certiorari. App. 27-28.

WHY THE WRIT SHOULD BE GRANTED

1. The South Carolina Supreme Court's holding that Simmons does not apply to the statutory scheme governing petitioner's sentencing hearing has been overruled by this Court's intervening decision in Shafer v. South Carolina, 532 U.S. ___ (2001).

Petitioner's case is yet another in a series of decisions which recently led this Court to observe that "South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status." Shafer v. South Carolina, 532 U.S. ___, slip op. at 10 (March 20, 2001). This time, as related above, the state court's refusal rests on alternative holdings. First, the state supreme court held that while the state's evidence and jury argument "clearly" placed in issue petitioner's future dangerousness, they did so in a way that failed to trigger the due process rule of Simmons v. South Carolina, 512 U.S. 154 (1994). And second, the state court reiterated its holding, previously announced in State v. Starnes, 531 S.E.2d 907 (S.C. 2000), and State v. Shafer, 531 S.E.2d 524 (S.C. 2000), that Simmons is in any event inapplicable to the current South Carolina sentencing scheme.

The second of these holdings has now been expressly rejected by Shafer v. South Carolina, 532 U.S. ___ (2001). In Shafer, this Court held that the possibility of a less-than-life sentence in cases where the prosecution fails to establish the defendant's death-eligibility does not remove South Carolina's sentencing scheme from the ambit of Simmons. The state court's decision to

the contrary cannot stand in light of Shafer.

2. Because the prosecution presented both evidence and argument calculated to persuade the jury that petitioner would be dangerous unless executed, Simmons entitled him to an instruction that he would be ineligible for parole if sentenced to life imprisonment.

The South Carolina Supreme Court also held that the state did not place the defendant's future dangerousness in issue as required by Simmons. The present case therefore presents for decision an important question that this Court found to be "not ripe for . . . resolution" in Shafer. Slip op. at 16. The Shafer Court described the issue as follows:

> In the trial court, the prosecutor and defense counsel differed on what it takes to place future dangerousness 'at issue.' The prosecutor suggested that the State must formally argue future dangerousness. Defense counsel urged that once the prosecutor introduces evidence showing future dangerousness, the State cannot avoid a Simmons charge by saying the point was not argued or calling the evidence by another name.

Slip op. at 17 (record citations omitted). Because the South Carolina Supreme Court had not explicitly focused on or resolved this question when it initially rejected Shafer's Simmons claim, this Court remanded his case for further consideration. Here, however, the state court expressly held that petitioner's future dangerousness, as that concept is employed in Simmons, was neither "'a logical inference from the evidence' [nor] 'injected into the case through the State's closing argument'" Shafer v. South Carolina, supra, quoting State v. Kelly, supra, 540 S.E.2d at 857.

This holding was incorrect on both points: the issue of petitioner's future dangerousness was both a logical inference from the state's evidence and was hammered home in closing argument. The state supreme court majority's holding to the contrary reflects a recalcitrant refusal to implement this Court's decision in Simmons, and warrants correction.

A. There is no basis in law or logic for South Carolina's insistence that a convicted murderer's future dangerousness in prison carries no inference of future dangerousness outside of prison.

The state court acknowledged that the prosecutor "clearly presented" both evidence and argument to the effect that petitioner would pose a violent escape risk while incarcerated. 540 S.E.2d at 855-57. According to the state court, however, this explicit claim of future dangerousness did not implicate the Simmons right of rebuttal because the fact of petitioner's parole ineligibility did not directly rebut the state's implication that he would attempt to secrete weapons, take hostages and escape if he was not executed. Id. at 857.

Of course, a dangerous prisoner can fashion shanks, take hostages and try to escape whether or not he is eligible for parole. What the state court overlooked, however, is that evidence of dangerousness in prison is also powerful evidence of dangerousness outside of prison, where the defendant will have much more freedom to indulge whatever violent impulses he may harbor. Evidence that for this particular defendant, not even prison was

effective in curbing his violent tendencies created a particularly strong inference of generalized future dangerousness. So while an accurate instruction on petitioner's parole ineligibility would not have answered the state's claim that he would be dangerous while serving a life sentence in prison, it would have allayed the jury's inevitable concern that petitioner would prove all the more violent should he ever be paroled back into society.[4]

In this connection, the South Carolina Supreme Court may have misunderstood the Court's observation in Simmons concerning the relationship between accurate instructions on parole ineligibility and dangerousness in prison. As the Simmons plurality noted,

> the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. But the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility.

512 U.S. at 165. Likewise, Justice O'Connor noted that whenever due process entitles a capital defendant to inform the jury of his

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[4]One facet of the state's case--petitioner's alleged hostage-taking plan--was especially likely to have reminded the jury of the obvious relationship between in-prison and out-of-prison dangerousness. The state's claim that petitioner tried to lure a slightly-built female jail officer into his cell while hiding a homemade knife behind his back must have struck the jury as eerily similar to the facts of the Shealy murder itself. If petitioner was inclined to repeat such crimes even while confined in the highly restrictive setting of a county jail, the jury surely reasoned, he would be particularly likely to do so if and when he was released from prison.

parole ineligibility, "the prosecution is free to argue that the defendant would be dangerous in prison." Id. at 177. These passages make clear that proof of a defendant's likely misconduct in prison is a permissible prosecution response to the fact that he will be ineligible for parole, but not, as the prosecutor and the South Carolina Supreme Court seemed to think, a basis for withholding accurate parole information in the first instance.[5]

B. Even if the prosecution's claim of in-prison dangerousness had not entitled petitioner to the protection of *Simmons*, the state's other evidence and argument did.

In addition to his claim that petitioner would likely attempt to stage violent escape attempts in the future if not executed, the prosecutor made other, generalized claims of future dangerousness. Most egregious was his explicit claim during closing argument that petitioner was all the more dangerous because his lack of mental disability rendered his crimes unpredictable. In making this argument ("Doesn't that make somebody a little more dangerous[?]"),

[5]The one federal case cited by the South Carolina Supreme Court on this point appears to reflect a similar misreading of Simmons. In Allridge v. Scott, 41 F.3d 213, 223 (5th Cir. 1994), the court suggested in dictum that "when the state argues that the defendant poses a future danger to everybody, fellow inmates included, then Simmons is inapplicable because whether the defendant is eligible for parole is irrelevant." This suggestion was not necessary to the judgment, because the defendant in Allridge was actually eligible for parole under state law. Outside of South Carolina, no court appears to have upheld the denial of a Simmons instruction solely because the state's proof of the defendant's dangerousness was restricted to the controlled and highly-structured setting of prison.

the prosecutor appears to have momentarily forgotten the "no-dangerousness" charade by which he was attempting to circumvent this court's decision in Simmons: his subsequent attempt to confine this general allegation of future dangerousness to the already-murdered victim seems a hastily-improvised (and somewhat illogical) response to defense counsel's Simmons-related objection.

Nor was this the only explicit reference to generalized future dangerousness in the prosecutor's highly emotional summation. Throughout his closing argument, the prosecutor portrayed petitioner as an incorrigible killer: he evoked the memory of Billy the Kid, tagged petitioner as "Bloody Billy" and as "the Butcher of Batesburg," provided the jury with future-dangerousness aphorisms such as "murderers will be murderers," and expressed the hope that the jurors would never again be so close to a murderer as they were at that moment. He called petitioner "cold-blooded" and "more frightening than a serial killer, more frightening than a career criminal." And this cascade of dangerousness rhetoric was fed not only by the facts of petitioner's crime and post-arrest conduct, but also by prosecution cross-examination about petitioner's obsessive thoughts of killing people, and his history of torturing and killing small animals.

Even if the prosecutor did modulate parts of his summation as a tactic intended to avert a truthful Simmons instruction, his argument raised petitioner's alleged future dangerousness much more

explicitly than anything in Simmons itself. In that case, the sum total of the prosecutor's argument on future dangerousness was as follows:

> The question for the jury, the prosecution argued, was "what to do with [petitioner] now that he is in our midst." The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 177. These veiled references to Simmons' dangerousness were just that: veiled references. Indeed, two dissenting Justices detected nothing at all in the prosecutor's argument that even referred to Simmons' future behavior: to the dissenters, the "in-our-midst" passage referred only to Simmons' alleged attempt to blame his crimes on his childhood environment, while the "self-defense" reference was merely an appeal for a calm and dispassionate societal response to Simmons' brutal crimes, rather than a sentence based on anger or emotion. 512 U.S. at 181-82 (Scalia, J., dissenting). If the prosecutor's argument in Simmons sufficed to place Simmons' dangerousness in issue, so did the much more explicit cross-examination and argument here.

C. The applicability of *Simmons* should not depend on prosecutors' creativity in manipulating the elusive distinction between evidence of character and evidence of future dangerousness.

In denying petitioner's request for a Simmons instruction, the trial judge ruled that the state's evidence of future dangerousness actually went to petitioner's "character and characteristics."

This purported distinction between bad character and dangerousness does find support in prior South Carolina decisions, see, e.g., State v. Young, 459 S.E.2d 84, 87 n.4 (S.C. 1994), but this Court's cases are to the contrary. California v. Ramos, 463 U.S. 992, 1006 n.20 (1983) ("[A] . . . jury's evaluation of the defendant's future dangerousness may rest on lay testimony about the defendant's character and background and the inferences to be drawn therefrom"); Ramdass v. Angelone, 120 S.Ct. 2113, 2122 (2000) ("To demonstrate Ramdass' evil character and his propensity to commit violent acts in the future, the prosecutor used Ramdass' prior criminal conduct. . . ."). In this context, moreover, the distinction is meaningless. When the prosecution seeks to prove that a teenaged murderer has exhibited unpredictable and extreme violence, cannot be rehabilitated, lacks remorse, and behaves violently in jail, it is trying to prove that his character is one of persistent and violent criminality--which is to say, that he is dangerous and will remain so. The defendant's right to inform the jury that he will never be released from prison does not depend on whether this portrayal is labeled "dangerousness" or "character," because in this setting the two terms mean the same thing. See Skipper v. South Carolina, 476 U.S. 1, 7 (1986) (rejecting South Carolina's effort to distinguish between capital defendant's "past good conduct to prove good character and use of the same evidence to establish future good conduct in prison.").

South Carolina's resistance to this Court's due process holding in Simmons has continued too long. Virtually alone among the nation's 40 death penalty jurisdictions, see Shafer v. South Carolina, supra, slip op. at 10, n. 4, South Carolina continues to devise new rationales for its unfair and unconstitutional refusal to inform sentencing juries of the alternative to the death penalty that state law provides. By refusing to acknowledge the state's obvious injection of the issue of future dangerousness into petitioner's sentencing hearing, the South Carolina Supreme Court has sought, in effect, to vitiate the Simmons rule. Unless corrected by this Court, the precedent established by this case will authorize South Carolina prosecutors who wish to evade Simmons to do so by the simple expedient of giving a new name to the state's case on the issue of dangerousness. The Court should not permit such persistent disregard of one of its constitutional precedents, in this or any other case.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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PETITIONER.

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of South Carolina.

The STATE, Respondent,
v.
William Arthur KELLY, Appellant.

No. 25226.

Heard Sept. 20, 2000.
Decided Jan. 8, 2001.

Defendant was convicted in Circuit Court, Lexington County, Gary E. Clary, J., of crimes of murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime, and was sentenced to death. Defendant appealed. The Supreme Court, Waller, J., held that: (1) probative value of murder victim's pregnancy outweighed its prejudicial effect; (2) trial court was warranted in denying requested parole ineligibility instruction; (3) trial court was warranted in denying absence of dangerousness instruction; (4) State's questions of witness, including "what did I tell you" improperly bolstered witness' credibility, but was harmless error; (5) testimony that victim's child said "a bad man had killed his mommy" was not hearsay.

Affirmed.

Pleicones, J., dissented and concurred in part in separate opinion.

West Headnotes

[1] Homicide k164
203k164

Probative value of murder victim's pregnancy outweighed its prejudicial effect, where State's theory of case was that defendant planned his crimes, and because he knew victim was pregnant and particularly vulnerable, jury could infer that defendant had consciously selected a "perfect victim," making it less probable that he committed voluntary manslaughter.

[2] Criminal Law k338(7)
110k338(7)

"Unfair prejudice" for purposes of rule permitting exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one.

[3] Criminal Law k338(1)
110k338(1)

[3] Criminal Law k1153(1)
110k1153(1)

Trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion.

[4] Homicide k11
203k11

"Malice" is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.

[5] Homicide k33

203k33

"Voluntary manslaughter" is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.

[6] Sentencing and Punishment k1780(3)
350Hk1780(3)

For a defendant to be entitled to a parole ineligibility instruction during penalty phase of murder prosecution, two prongs must be met: (1) State must put the defendant's future dangerousness in issue, and (2) the only available alternative sentence to death is life imprisonment without possibility of parole.

[7] Sentencing and Punishment k1780(3)
350Hk1780(3)

During penalty phase of capital murder prosecution, defendant's future dangerousness was neither logical inference from evidence nor injected into case through State's closing argument, so as to support parole ineligibility instruction, where evidence showed that defendant was an escape threat, rather than future danger to general public, and State's argument that defendant was worse than a serial killer, and "murderers will be murderers," indicated death penalty was appropriate primarily as retribution for heinous nature of murder of victim. U.S.C.A. Const.Amend. 14.

[8] Sentencing and Punishment k1780(3)
350Hk1780(3)

Parole ineligibility instruction informs the jury that by rejecting the death penalty, a defendant will spend the rest of his natural life in prison.

[9] Sentencing and Punishment k1780(3)
350Hk1780(3)

Parole ineligibility instruction should not, and does not, apply when as a matter of law another sentence other than death or life without parole is available to a capital defendant.

[10] Sentencing and Punishment k1780(3)
350Hk1780(3)

During penalty phase of capital murder prosecution, potential 30-year mandatory minimum sentence for capital murder existed, so as to defeat defendant's argument that he was entitled to parole ineligibility instruction because only alternative to death sentence was life imprisonment without parole, given inappropriateness of presuming that in certain cases jury will always find particular statutory aggravating circumstance.

[11] Criminal Law k769
110k769

Purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict.

[12] Criminal Law k814(2)
110k814(2)

Law to be charged to the jury is determined by the evidence presented at trial.

[13] Criminal Law k814(3)
110k814(3)

Trial court should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury.

[14] Sentencing and Punishment k1780(3)
350Hk1780(3)

In penalty phase of capital murder prosecution, trial court was warranted in denying defendant's request for absence of dangerousness instruction, where State would not argue that defendant was danger to public at large, but rather that defendant presented future danger to others in prison.

[15] Sentencing and Punishment k1780(2)
350Hk1780(2)

State is permitted to argue that a capital defendant might pose a future danger to those within prison.

[16] Sentencing and Punishment k1780(2)
350Hk1780(2)

[16] Sentencing and Punishment k1789(9)
350Hk1789(9)

Assistant solicitor's questions "what did I tell you" and "did I tell you to tell the truth," improperly bolstered witness' credibility during penalty phase of capital murder prosecution, but nevertheless, questions were harmless error, given that defendant cross-examined witness about his prior criminal record which included grand larceny, burglary and forgery convictions, and elicited witness's acknowledgment that he was federal inmate, who wished to have sentence reduced.

[17] Criminal Law k720(5)
110k720(5)

Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.

[18] Sentencing and Punishment k1766
350Hk1766

During sentencing phase of capital murder case, State's witness' testimony that murder victim's child said "a bad man had killed his mommy" was not hearsay, since testimony was not introduced to prove that a bad man killed victim, but instead, was offered to show impact murder had victim's young child and rest of her family. Rules of Evid., Rule 801(c).

***852** Assistant Appellate Defender Robert M. Dudek of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

***853** WALLER, Justice.

A jury convicted appellant William Kelly of murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. Kelly was sentenced to death for murder, thirty years consecutive for armed robbery, and five years consecutive for possession of a knife during the commission of a violent crime. This case consolidates his direct appeal with the mandatory review provisions of S.C.Code Ann. § 16-3-25 (1985). We affirm.

FACTS

On the night of January 5, 1996, police officer Stephen Clare drove by the Batesburg KFC and noticed in the parking lot a car running with the driver's door open. Knowing that it was after the restaurant's usual closing time and

recognizing the car as belonging to Shirley Shealy, the manager of the KFC, Officer Clare pulled in to investigate. Officer Clare discovered Shealy's body in the KFC; her hands were taped behind her back, and money was strewn all over the floor and stuck to her bloody body.

Kelly, a former KFC employee, had visited the KFC earlier that day. After interviewing KFC employees, Batesburg-Leesville Chief of Police William Oswald attempted to locate Kelly. On January 8, 1996, Kelly's mother called Chief Oswald and told him that Kelly was in Lowell, Massachusetts. Lowell police detectives found Kelly at his sister's residence in Lowell. Kelly, who was seventeen years old at the time, was advised of his *Miranda* [FN1] rights and made a statement to the detectives admitting that he killed Shealy and stole money from the KFC. Kelly had in his possession money stained with Shealy's blood. In addition, the Lowell detectives retrieved Kelly's bloodstained clothing from his car.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Kelly was indicted for murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. At trial, the forensic pathologist who performed the autopsy testified that Shealy was stabbed thirty-one times and her neck was cut from ear to ear. She bled to death. At the time of her death, Shealy was 23 weeks pregnant. The jury convicted Kelly on all charges.

In the sentencing phase, the trial court instructed the jury on five statutory aggravating circumstances, to wit, that the murder was committed while in the commission of: (1) kidnapping; (2) burglary; (3) robbery while armed with a deadly weapon; (4) larceny with use of a deadly weapon; and (5) physical torture. *See* S.C.Code Ann. § 16-3-20(C) (Supp.1999). The jury was charged on three statutory mitigating circumstances: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the age of the defendant at the time of the crime; and (3) the defendant was below the age of eighteen at the time of the crime. *Id.* The jury found all five aggravating circumstances and recommended the death penalty. Accordingly, the trial court imposed a sentence of death for the murder conviction.

ISSUES

1. Did the trial court err by refusing to redact from Kelly's statement references to Shealy's pregnancy?

2. Did the trial court err by refusing to charge the jury on parole ineligibility?

3. Did the trial court err by refusing to charge the jury that future dangerousness was not at issue?

4. Was the testimony of Matthew McCormack improperly bolstered by the State?

5. Did the trial court err by allowing testimony from Shealy's sister about statements made by Shealy's son?

1. FAILURE TO REDACT REFERENCES TO VICTIM'S PREGNANCY

Kelly raises only one issue regarding the guilt phase of his trial. He argues that the trial court erred by not redacting from his confession references to Shealy's pregnancy. We disagree.

Kelly gave the Lowell police a written statement which the State introduced at trial. In his statement, Kelly confessed to slitting Shealy's throat and stabbing her repeatedly. Basically, Kelly's explanation for why he *854 killed Shealy was that his attack was in response to Shealy's request for sex. He stated that while he worked at the KFC, Shealy would "always" proposition him sexually. Kelly stated that on January 5, 1996, he went to the KFC after closing time and saw Shealy in the office. According to Kelly, Shealy again propositioned him for sex, grabbed him, and asked him not to leave. He stated that he duct-taped Shealy's hands behind her back so she would not touch him. Kelly said that as he went to leave, Shealy got her hands free, grabbed him and started hitting him. Kelly stated that he then took out his knife, slit her throat and continued to stab her while she kept grabbing at him. Kelly told the Lowell police that Shealy then fell to the floor and was gasping for air. To keep her from getting up, Kelly said that he again taped her hands behind her back.

[1] Kelly made two references to Shealy's pregnancy in his statement. First, he stated that he "did know that Shirley was pregnant." Second, Kelly stated that Shealy asked him "to stay and have sex with her" and that she told him "since she was pregnant already" he could not get her pregnant if they had sex.

At the outset of the guilt phase, Kelly moved to exclude any evidence that Shealy was pregnant. The State informed the trial court that it planned on introducing Kelly's statement which, as detailed above, included references to the pregnancy. Kelly then moved to redact those references. The trial court denied the motion. With the exception of Kelly's statement, the State did not introduce any evidence about Shealy's pregnancy during the guilt phase of the trial. Kelly presented no witnesses in his defense. At Kelly's request, the jury was instructed on voluntary manslaughter.

In the State's guilt phase closing argument, Shealy's pregnancy was mentioned twice without objection. The State argued that Kelly had "the perfect victim. He's got a pregnant lady. Is she going to do what he says? Yes, ma'am. Yes, sir." The State noted the pathologist's testimony that there were no defensive wounds and no blood on Shealy's hands. The State therefore argued that Kelly's statement that Shealy's hands were free during the attack was not credible. Specifically, the State argued that if her hands were free, "What is she going to do? She's going to be covering up. She's going to be trying to avoid it. She's pregnant."

Kelly contends that the trial court should have redacted his statement to remove the references to Shealy's pregnancy because the evidence was not relevant, or, alternatively, the probative value of this evidence was outweighed by its unfairly prejudicial impact. We disagree.

[2][3] Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. Nevertheless, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Unfair

prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (citation omitted). The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion. *Id.* at 380, 401 S.E.2d at 148.

[4][5] The jury was instructed on both murder and voluntary manslaughter. [FN2] Thus, there was an issue on the presence or absence of malice. *See State v. Gandy*, 283 S.C. 571, 573, 324 S.E.2d 65, 66-67 (1984) (voluntary manslaughter is distinguished from murder because "the vital element of malice is missing") *implicitly overruled on other grounds by Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C.Code Ann. §§ 16-3-10, 16-3-50 (1985 & Supp.1999). " 'Malice' is the wrongful intent to injure another and indicates a wicked or depraved ***855** spirit intent on doing wrong." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

FN2. Murder is "the killing of any person with malice aforethought, either express or implied." S.C.Code Ann. § 16-3-10 (1985). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *E.g., State v. Johnson*, 333 S.C. 62, 508 S.E.2d 29 (1998); *see also* S.C.Code Ann. § 16-3-50 (1985) (manslaughter is "the unlawful killing of another without malice").

We believe the evidence of Shealy's pregnancy was relevant to the issue of intent, i.e., whether Kelly acted with malice. The State's theory of the case was that Kelly planned his crimes. [FN3] Because Kelly knew Shealy was pregnant, and thus, particularly vulnerable, the jury could infer that Kelly had consciously selected a "perfect victim." Such evidence of planning certainly negates voluntary manslaughter which requires a showing of provocation. Additionally, although the evidence of Shealy's pregnancy came directly from Kelly's own statement, this evidence tended to refute Kelly's version of how the attack occurred. Therefore, Kelly's references to the pregnancy made it less probable that he committed voluntary manslaughter. *See* Rule 401, SCRE. Moreover, the fact that Kelly killed a pregnant woman, in our opinion, "indicates a wicked or depraved spirit intent on doing wrong." *State v. Kelsey, supra.* The evidence was, therefore, probative on the issue of whether Kelly acted with malice.

FN3. For example, the State established that the type of latex gloves and duct tape used in the attack were not used by the KFC and that they were used at the McDonald's where, at the time of his crimes, Kelly was working as a cook.

Kelly argues that this evidence undeniably had an emotional impact on the jury, and thus should have been excluded because it was unfairly prejudicial. As discussed above, the evidence was relevant to the only real issue in the guilt phase-the presence or absence of malice. Accordingly, we believe the probative value of the evidence outweighed its prejudicial effect. *Compare State v. Garner*, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is *not* a contested issue) *with State v. Simmons*, 310 S.C. 439, 427 S.E.2d 175 (1993) (probative value of other-crimes evidence outweighed its prejudicial effect where the issue of intent was a contested one), *reversed on other grounds by Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). [FN4]

FN4. Additionally, we note that the manner in which the evidence was introduced minimized its prejudicial effect. The State did not elicit testimony about Shealy's pregnancy from any witness in the guilt phase. The only evidence admitted on the fact came in through Kelly's statement. Likewise, in the State's guilt phase closing argument, Shealy's pregnancy was mentioned only twice.

We hold that the trial court did not abuse its discretion in admitting evidence of Shealy's pregnancy in the guilt phase. *State v. Alexander, supra.* Accordingly, Kelly's convictions are affirmed.

2. REFUSAL TO GIVE PAROLE INELIGIBILITY INSTRUCTION

Kelly argues that the trial court erred in the sentencing phase when it refused to instruct the jury that he would be ineligible for parole if sentenced to life. Kelly contends that since the State presented evidence of Kelly's future dangerousness, due process and *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), required the parole ineligibility charge. We hold that *Simmons* does not apply to this case, and therefore, the trial court correctly declined to give the instruction.

In the sentencing phase, the State presented several witnesses who testified about Kelly's actions while he was incarcerated at the Lexington County Detention Center. The jail administrator testified that an attempted escape charge had been filed against Kelly because a mortar joint around a cinder block in his cell had been gouged out. [FN5] Matthew McCormack, who had twice been Kelly's cellmate at the jail, testified that he and Kelly often spoke of escaping and that Kelly had, at one point, taken action on an escape plan. McCormack stated that Kelly made a shank and planned to take a female correctional officer hostage. Although Kelly called the correctional officer to their cell, McCormack stated that Kelly backed out of going through with the plan. The State also questioned correctional officer Mark Wharton who testified that he discovered a shank in Kelly's possession. Finally, Edward Bryant, ***856** who had been in jail with Kelly, testified that he heard Kelly talk about escape. In addition, Bryant testified that Kelly bragged about his crime, requested that he be called "KFC," and walked around with a cup which had a drawing of a chicken with its head cut off and a knife on it.

FN5. On cross-examination, Kelly emphasized he was only one of three inmates housed in that cell and it had not been proven he was the one who actually had dug out the mortar around the cinder block.

At the conclusion of the sentencing phase, Kelly requested the following jury charge:

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community

supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

See S.C.Code Ann. § 16-3-20 (Supp.1999). The State objected to the charge and stated that because it was not going to argue future dangerousness, the charge was not required by *Simmons*. Ruling that the State's evidence went to Kelly's character and characteristics and not to future dangerousness, the trial court denied the request to charge. [FN6]

FN6. The jury was given a plain meaning charge.

In closing argument, the State argued that the death penalty was "the punishment that fits the crime." The State argued that Kelly had planned his crime and that he was a "master murderer." Because Kelly had no prior record, the State argued that a person who commits "an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal.... You kind of trust them a little bit." Further, the State argued that Kelly was intelligent, quick-witted and did not have any mental illness. Thus, the State argued that made Kelly "a little more dangerous ... for this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy." Finally, the State recounted, over objection, the evidence regarding Kelly's attempted escapes from jail and that he had a shank. The State then argued that "murderers will be murderers. And he is the cold-blooded one right over there."

On appeal, Kelly contends that: (1) the State's evidence about escape attempts, possession of a shank, and his behavior in jail raised the issue of future dangerousness; (2) the State argued future dangerousness in its closing; and therefore, (3) the trial court erred in refusing to charge the jury regarding Kelly's parole ineligibility. Kelly argues he was denied due process because the jury instruction was mandated by *Simmons*.

In *Simmons*, a plurality of the United States Supreme Court held that when a capital defendant would be ineligible for parole if sentenced to life in prison and the State argues the defendant's future dangerousness as a basis for imposing the death penalty, the defendant is entitled to have the jury informed of his parole ineligibility through either defense argument or instruction by the trial judge. *Simmons, supra.* [FN7] The *Simmons* Court explained that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' " *Id.* at 161, 114 S.Ct. at 2192, 129 L.Ed.2d at 141 (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393, 404 (1977)). Thus, the Court ruled that the "State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 171, 114 S.Ct. at 2198, 129 L.Ed.2d at 147.

FN7. Shortly after *Simmons* was decided, this Court held that the trial judge *must* charge a capital defendant's parole ineligibility when future dangerousness is at issue and either the defendant requests such a charge or the jury inquires about the meaning of "life imprisonment." *State v. Southerland*, 316 S.C. 377, 387, 447 S.E.2d 862, 868 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

[6] To be entitled to a *Simmons* charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to death is life imprisonment without possibility of parole. *Id.* at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); *see also State v. McWee*, 322 S.C. 387, 391-92, 472 S.E.2d 235, ***857** 238 (1996), *cert. denied*, 519 U.S. 1061, 117 S.Ct. 695, 136 L.Ed.2d 618 (1997) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence"). Kelly has not met either prong of the *Simmons* test.

[7] First, we agree with the trial court that the State's evidence at sentencing did not implicate future dangerousness. Evidence that Kelly took part in escape attempts and carried a shank simply is not the type of future dangerousness evidence contemplated by *Simmons*. [FN8] The underlying principle of the *Simmons* holding is that if evidence of future dangerousness is presented by the State, the defendant must be allowed to *rebut* this evidence by showing that he will never be eligible for parole, i.e., that he will never *legally* be let out of prison. In the instant case, however, Kelly argues that the evidence he is an escape threat (and thus a risk to the general public) required that the jury be instructed on parole ineligibility. The flaw in Kelly's argument is that a *Simmons* charge would not rebut this evidence. Telling a jury that a convicted murderer will never be eligible for parole simply does not respond to the State's evidence that he presents an escape risk.

FN8. When the State argues future dangerousness, it "urge[s] the jury to sentence the defendant to death so that he will not be a danger to the public *if released* from prison." *Simmons*, 512 U.S. at 163, 114 S.Ct. at 2193, 129 L.Ed.2d at 142 (emphasis added).

In our opinion, the evidence presented by the State in the penalty phase was designed to show that Kelly would not adapt to prison life because in jail he had been caught carrying a weapon and planning or participating in escape attempts. Kelly was allowed to rebut this evidence, through both cross- examination of the State's witnesses and the witnesses presented in his defense. [FN9] Thus, Kelly was given the opportunity to deny or explain the State's evidence, in accordance with due process requirements.

FN9. Kelly presented expert testimony from a clinical psychologist, Dr. Steven Shea, and a correctional management consultant, James Aiken. Dr. Shea testified that Kelly could adjust to prison. Aiken testified that Kelly could be "adequately managed, housed and secured without endangerment in a correctional facility within the South Carolina Department of Corrections."

Kelly further contends that the State argued future dangerousness to the jury and thus misled the jury in violation of his due process rights. Specifically, Kelly argues that the State's

argument that Kelly is worse than a serial killer and that "murderers will be murderers" constituted argument on future dangerousness. We disagree. A fair reading of the State's closing argument shows that the State consciously avoided any implication of future dangerousness. Not once did the State suggest to the jury that it should impose the death penalty because Kelly would be a future danger to the general public. *Cf. Simmons, supra* (where the Court found the following arguments to be generalized argument of future dangerousness: "what to do with [petitioner] now that he is in our midst" and that the death penalty would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense"). Instead, the State argued Kelly should be given the death penalty primarily as retribution for the heinous nature of the murder and because of the status of Shealy, the pregnant victim.

We hold that future dangerousness was not an issue in this case. It was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument.

Additionally, the second prong of the *Simmons* test was not met. The *Simmons* rule is applicable when the only alternative to a death sentence is life imprisonment without parole. *See Simmons*, 512 U.S. at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); *State v. McWee*, 322 S.C. at 391-92, 472 S.E.2d at 238. Because Kelly was tried under the new sentencing scheme which became effective on January 1, 1996, he could have been sentenced to either (1) death; (2) life without the possibility of parole; or (3) a mandatory minimum thirty year sentence. *See* S.C.Code Ann. § 16-3- 20 (Supp.1999). The mandatory minimum sentence of thirty years is available only if ***858** the jury returns with no finding of aggravating circumstances. *Id.*

[8][9] This Court recently held that *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000); *State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), *cert. granted*, ---- U.S. ----, 121 S.Ct. 30, 147 L.Ed.2d 1053 (2000). The logic behind this holding is that a *Simmons* charge is designed to answer the State's evidence that the defendant will be a future danger to society by telling the jury that if sentenced to life in prison, the defendant will never be paroled. In other words, a *Simmons* charge informs the jury that by rejecting the death penalty, the defendant will spend the rest of his natural life in prison. However, if another sentence other than life without parole is available to the defendant as an alternative to the death penalty, then a *Simmons* charge would actually mislead the jury by representing that the defendant would never be released from prison, when in fact, a thirty-year sentence is a potential sentence for the defendant. *See Starnes*, 340 S.C. at 329, 531 S.E.2d at 916 ("Contrary to a sentence of life imprisonment without parole, a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society."). Accordingly, *Simmons* should not, and does not, apply when *as a matter of law* another sentence other than death or life without parole is available to a capital defendant. [FN10]

> FN10. We note that the second prong of the *Simmons* test may be satisfied under certain circumstances. For example, if the recidivist statute is applied, there will be no third alternative sentence as a matter of law. *See* S.C.Code Ann. § 17-25-45 (Supp.1999) (imposing mandatory sentence of life imprisonment without parole where defendant has prior convictions of a most serious nature). If section 17-25-45 is invoked and future dangerousness is argued, *Simmons* is applicable because the only available sentences are life without parole or death. In the instant case, however, Kelly had no previous convictions, and therefore, section 17-25-45 does not affect our analysis of this issue.

[10] Nonetheless, Kelly contends that the thirty-year minimum sentence was not available to him because the jury would have violated its oath if it had not found at least one aggravating circumstance. Thus, Kelly argues that *Simmons* applies to the instant case. In *Starnes*, however, we stated that it is "inappropriate to assume the jury will find a statutory aggravating circumstance." *Id.* at 330, 531 S.E.2d at 917. Although we granted Kelly's motion to argue against the recent precedent set in *Starnes* and *Shafer*, we adhere to that precedent and hold it is not appropriate to presume that in certain cases a jury will always find particular statutory aggravating circumstances. *Cf. State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (where this Court found error in submitting to resentencing jury convictions from previous trial as evidence of aggravating circumstances; the Court stated that the convictions from the guilt phase were not "binding upon the resentencing jury" as it was the sentencing "jury's responsibility to find the existence, *or not*, of a statutory aggravating circumstance") (emphasis added). Therefore, Kelly cannot satisfy the second prong of the *Simmons* test.

We hold the trial court correctly refused to give the jury a *Simmons* charge. [FN11]

> FN11. Kelly also contends that the requested instruction was required because of James Aiken's testimony regarding good time credits. Aiken, Kelly's expert witness on prison management, testified on direct examination that prisoners may be sanctioned for disciplinary infractions by "taking good time away." On cross-examination, the State questioned Aiken further, and Aiken stated that he was speaking hypothetically, not about this particular case. Kelly argues that the testimony about good time credits raised the inference that he would be released from prison, and therefore, he should have been able to rebut the evidence with the parole ineligibility charge. We believe Kelly's contention is without merit. Aiken's testimony merely discussed, in general terms, internal prison procedures for dealing with disciplinary violations committed by inmates. Kelly was not denied the opportunity to rebut this evidence; therefore, his due process rights were not compromised. Moreover, we note his own counsel elicited this testimony on direct examination. *State v. Washington*, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (appellant may not complain about the admission of evidence elicited by his own counsel).

***859 3. REFUSAL TO CHARGE THAT FUTURE DANGEROUSNESS WAS NOT**

AT ISSUE

After his request on the parole ineligibility charge was denied, Kelly requested the following jury charge:

> I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may not consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during you deliberations as to the sentence to be imposed.
>
> At the same time, you should understand that your consideration of reasons not to impose the death penalty is unlimited. Thus, if you find from the evidence that the defendant's future behavior is likely to be good, that would be a proper factor for you to consider as a reason to sentence him to life imprisonment rather than the death penalty.

Because the State agreed not to argue future dangerousness, Kelly maintains that the trial court erred in failing to give the charge. We disagree.

[11][12][13] "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). The law to be charged to the jury is determined by the evidence presented at trial. *E.g., State v. Lee*, 298 S.C. 362, 380 S.E.2d 834 (1989). Furthermore, a trial court should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury. *Id.; see also State v. Leonard, supra* (a trial court commits error when it provides instructions which are calculated to confuse or mislead the jury).

[14][15] We hold that the trial court correctly denied the requested charge because the evidence did not support the charge as written. The State is permitted to argue that a capital defendant might pose a future danger to those within prison. This type of evidence and argument is distinguishable from what is considered "future dangerousness" under *Simmons*, i.e., a future danger to society. *Cf. State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (where the Court indicated that if prosecution had argued only that defendant posed a danger to other prison inmates, and had not included danger to society argument, then *Simmons* would not apply); *Allridge v. Scott*, 41 F.3d 213 (5th Cir.1994), *cert. denied*, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (where the court noted that *Simmons* is inapplicable where the State argues that the defendant poses a danger to everybody, including fellow inmates) (citing *Simmons*, 512 U.S. at 165 n. 5, 114 S.Ct. at 2194 n. 5). Therefore, the requested charge was clearly incorrect because it instructed the jury "there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment." This charge thus would have precluded the jury from considering evidence of Kelly's future danger to others within prison, evidence which was clearly presented by the State and appropriate for the jury to consider.

Moreover, the charge as written is extremely confusing. It simply would not have aided the jury in making its sentencing determination. *State v. Leonard, supra.*

Accordingly, the trial court did not err by denying this request to charge.

4. BOLSTERING OF STATE'S WITNESS

Kelly argues that the State improperly bolstered Matthew McCormack's testimony thereby impermissibly vouching for McCormack's credibility. We agree.

As recounted above in Issue 2, McCormack had been Kelly's cellmate. McCormack testified ***860** about Kelly making a shank and how he said he was going to use it to abduct a female correctional officer. In addition, McCormack testified that Kelly had frequently spoken about his crimes. McCormack stated that Kelly told him that he and Shealy had planned to rob the KFC but that Shealy had turned on him during the robbery. McCormack testified that Kelly told him that he came up behind Shealy and cut her throat and had tried to decapitate her.

Toward the end of McCormack's direct examination, the following colloquy took place:

> [Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?
>
> [McCormack]: Uh--excuse me?
>
> [Assistant Solicitor]: Did I tell you to tell the truth to this jury--
>
> [McCormack]: Of course.

At that point, Kelly objected on the grounds that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. After the trial court overruled the objection, the assistant solicitor continued:

> [Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?
>
> [McCormack]: The truth.

On cross-examination, Kelly questioned McCormack about his prior criminal record which included grand larceny, burglary and forgery convictions. Kelly also elicited testimony from McCormack, who was a federal inmate, regarding how in the federal system an inmate could get a sentence reduction if he provides helpful testimony to the government. McCormack acknowledged that the potential for a sentence reduction was "one of [his] main reasons for" testifying against Kelly.

[16] Kelly argues that the State's questioning impermissibly bolstered McCormack's credibility because it placed the prestige of the government behind McCormack, a jailhouse informant. Kelly also maintains that the assistant solicitor effectively became a witness in the case and vouched for McCormack's credibility.

In *United States v. Walker*, 155 F.3d 180 (3d Cir.1998), the Court of Appeals for the Third Circuit discussed generally the concept of vouching:

> Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury.... A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but

known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 184 (citations omitted).

Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument. *See id.* at 185- 87 (discussion of Third Circuit case law on vouching). In the instant case, however, Kelly's argument is targeted at the State's questioning of McCormack. At least one court has held that this type of questioning is improper. *See Mitchell v. State*, 549 P.2d 96 (Okla.App.1976) (where the prosecutor asked witness whether they had "talked about this case" and witness responded "Yes, sir. You instructed me to tell the truth," the court found improper bolstering).

[17] In our opinion, the State's questions served to improperly bolster McCormack's credibility. *Id.* Although perhaps not technically vouching, the manner of questioning [FN12] by the State raises the second concern outlined by the *Walker* court: the jury could have perceived that the assistant solicitor ***861** held the opinion that McCormack was, in fact, telling the truth. Thus, McCormack's testimony carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about McCormack. Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility. Accordingly, the trial court erred in overruling Kelly's objection.

FN12. Although the assistant solicitor did not comment that he had personal knowledge McCormack was telling the truth or had outside evidence indicating the truthfulness of McCormack's testimony, the assistant solicitor improperly phrased his questions in the first person. ("What did *I* tell you *that I absolutely required* regarding your testimony to this jury today?" and "Did *I* tell you to tell the truth to this jury?") (emphasis added).

Nevertheless, we believe that this error was harmless beyond a reasonable doubt. *See State v. Gaskins*, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (erroneous admission of evidence in sentencing phase reviewed for harmless error), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985), *overruled in part on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In our opinion, Kelly's cross-examination effectively impeached McCormack's credibility by eliciting information about his motive for testifying. Moreover, given the overwhelming evidence of aggravation in this case, we do not believe that the State's bolstering of McCormack materially influenced the jury's decision to impose the death penalty.

Accordingly, because the error was harmless, Kelly is not entitled to resentencing on this issue.

5. TESTIMONY FROM VICTIM'S SISTER

Kelly argues that the trial court erroneously admitted hearsay testimony from Shealy's sister Cynthia Slade. We disagree.

During the sentencing phase, the State called Slade who presented victim impact testimony. The State questioned Slade about Shealy's son Alex, who was six years old when Shealy was killed:

[Solicitor]: Have you seen Alex since his mother was murdered?
[Slade]: Yes, sir.
[Solicitor]: Has there been a change in him?
[Slade]: Oh, yeah.
[Solicitor]: Does he talk about it?
[Slade]: Yeah. He talks about it a lot [sic]. We were at a wedding and he told basically everybody--

Kelly's attorney objected on the basis of hearsay. The trial court overruled the objection. When the State asked what Alex had said, Slade responded:

He told everybody in the--at the wedding that a bad man had killed his mommy.

[18] Kelly argues Slade's testimony that Alex said "a bad man had killed his mommy" was impermissible hearsay and should have been excluded.

The South Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. By that definition, we believe Slade's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. That is, the evidence was not introduced to prove that a bad man killed Shealy. Instead, the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family. As such, it was properly offered as victim impact evidence. *See, e.g., State v. Byram*, 326 S.C. 107, 485 S.E.2d 360 (1997) (victim's sister's testimony about the effect of the victim's death upon herself and the victim's three children was relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness).

Accordingly, the trial court correctly allowed this evidence to be admitted.

Kelly's remaining issue [FN13] is affirmed pursuant to Rule 220(b)(2) and the following authorities: *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519, *cert. denied*, --- U.S. ----, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000) (autopsy photograph may be relevant to showing physical torture); *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998) (the determination of the relevancy, materiality, and admissibility of a photograph is left to the sound discretion of the trial judge); *State v. Kornahrens*, 290 ***862** S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987) (photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them are admissible in sentencing phase of capital trial).

FN13. Kelly argues that the trial court erred in admitting two of the State's photographic exhibits. As to Exhibit 116, an autopsy photograph, we note Kelly maintains that the exhibit "shows the fetus in the decedent's stomach." On the contrary, it is clear from both the photograph and the testimony at trial that this exhibit depicts Shealy's gaping neck wound.

CONCLUSION

Kelly's convictions and sentences are affirmed.

We have conducted the proportionality review required by S.C.Code Ann. § 16-3-25(C) (1985). The death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209, *cert. denied*, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998); *State v. Powers*, 331 S.C. 37, 501 S.E.2d 116, *cert. denied*, 525 U.S. 1043, 119 S.Ct. 597, 142 L.Ed.2d 539 (1998).

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur.

PLEICONES, J., dissenting and concurring in part in a separate opinion.

PLEICONES, Justice, dissenting and concurring.

I concur in the majority opinion with the exception of that portion which affirms the trial judge's refusal to give the requested parole ineligibility instruction. I would, therefore, affirm the convictions of the appellant, and reverse and remand for a new sentencing proceeding. It is my view that a *per se* rule should be adopted, requiring that, when requested, a parole ineligibility instruction be given to the jury deciding sentencing in a capital case.

In this case, appellant requested the following charge at the end of the sentencing phase:

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

The majority affirms the trial judge's denial of this legally correct charge which is taken virtually verbatim from S.C.Code Ann. § 16-3-20(A) (Supp.1999). The majority relies upon our decisions in *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000), and *State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), [FN1] which hold that most capital defendants in South Carolina are no longer entitled to a parole ineligibility charge under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). Under *State v. Starnes, supra*, and *State v. Shafer, supra, Simmons* did not apply because appellant would not necessarily have received a sentence of life imprisonment had the jury failed to find a statutory aggravating circumstance. [FN2] Appellant, as the majority points out, could have received a mandatory minimum sentence of at least thirty years without the possibility of parole.

> FN1. Appellant was granted permission to argue against these precedents. The United States Supreme Court has granted certiorari in *Shafer, supra*, --- U.S. ----, 121 S.Ct. 30, 147 L.Ed.2d 1053 (2000).

> FN2. Appellant had no previous convictions of either "serious" or "most serious" offenses. *See* S.C.Code Ann. § 17-25-45 (Supp.1999) (defining these offenses).

Further, the majority adheres to this Court's recent ruling in *State v. Starnes, supra*, that it is inappropriate to presume that juries will always find the existence of aggravating circumstance.

I propose a rule that is not dependent upon the shifting grounds of constitutional interpretation, is simple to apply, and has the result of fully informing the jury of its options. We have taken great pains to advise the jury that it is the final sentencing authority in a capital case. [FN3] That being the case, the jury should be equipped with the same ***863** knowledge in terms of sentencing as a sentencing judge. In my opinion, we should take this opportunity to clarify and simplify the rule for charging capital juries on the defendant's ineligibility for parole or early release.

> FN3. A trial judge must, of course, still make an affirmative finding that the death penalty was warranted under the evidence, and that it was not the result of passion, prejudice, caprice, or any other arbitrary factor. S.C.Code Ann. § 16-3-20(C)(b) (Supp.1999).

Under our current capital sentencing scheme, if the defendant has been previously convicted of a "serious" or "most serious" offense [FN4] he faces only two possible sentences: death, or life imprisonment without possibility of parole. S.C.Code Ann. § 17-25-45 (Supp.1999).

> FN4. S.C.Code Ann. § 17-25-45(C)(1) and (2) (Supp.1999).

If the defendant has not been previously convicted of a "serious" or "most serious" offense, the potential sentences depend upon the jury's finding of at least one statutory aggravating circumstance. If the jury finds a statutory aggravating circumstance, the only sentencing choice to be made is whether to impose the death penalty or life imprisonment without possibility of parole. Should the jury fail to find the existence of a statutory aggravating circumstance, the sentence rests in the discretion of the trial judge. Her choices are life imprisonment, or a mandatory minimum term of at least thirty years. The defendant is parole ineligible in either circumstance. [FN5]

> FN5. § 16-3-20(A) and (C)(b) (Supp.1999).

In my opinion, the unique circumstances of a capital case require that the sentencing authority--whether judge or jury--be fully informed with regard to sentencing options, including the convicted offender's parole ineligibility.

I would hold that where requested by the defense, a properly phrased parole ineligibility charge must be given to the jury in a capital case.

The jury would be instructed that should they find the existence, beyond a reasonable doubt, of one of more aggravating circumstances, there would be but two potential punishments: life imprisonment or the death penalty. The jury would further be informed that life imprisonment means until death, and that the defendant would be ineligible for parole or other early release. This is the charge requested by appellant here.

The jury would also be informed that should it fail to find the existence, beyond a reasonable doubt, of at least one statutory aggravating circumstance, the punishment would be solely within the province of the trial judge. The jury would be told that the sentencing options would

be limited to life imprisonment without the possibility of parole, or, assuming the defendant were a non-recidivist, a mandatory minimum of at least thirty years, also without the possibility of parole.

I agree with Justice Blackmun's plurality opinion in *Simmons v. South Carolina, supra,* wherein he discussed the perceptions of most jurors regarding parole:

> It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States.... An instruction directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment'. *Id.* at 169-70, 114 S.Ct. at 2197, 129 L.Ed.2d at 146. The *Simmons* plurality noted that, at the time it was decided, twenty-six states empowered juries in capital sentencing and provided for life imprisonment without parole as an alternative punishment. Of those states, seventeen required that the jury be expressly informed of the defendant's parole ineligibility. *See id* at n. 7. The Commonwealth of Virginia recently joined that number with its Supreme Court's decision in *Yarbrough v. Commonwealth,* 258 Va. 347, 519 S.E.2d 602 (1999). In my opinion, this State should likewise adopt the practice.

In its search for an appropriate sentence, the jury should have the benefit of clear and accurate instructions regarding its options. A "plain meaning" instruction does not adequately inform the jury. Without the knowledge that, if aggravators are found, a life sentence is not subject to being reduced by parole, or any other method of early release, the jury is likely to speculate unnecessarily on the possibility of early release, and impose ***864** a sentence of death based upon "fear rather than reason." *Yarbrough v. Commonwealth, supra, citing Farris v. Commonwealth,* 209 Va. 305, 307, 163 S.E.2d 575, 576 (1968). A parole ineligibility charge would eliminate any speculation. Since such a charge was not given in this case despite appellant's request, I would reverse the sentence and remand for a new sentencing proceeding.

END OF DOCUMENT

The Supreme Court of South Carolina

State of South Carolina, Respondent,

v.

William Arthur Kelly, Petitioner.

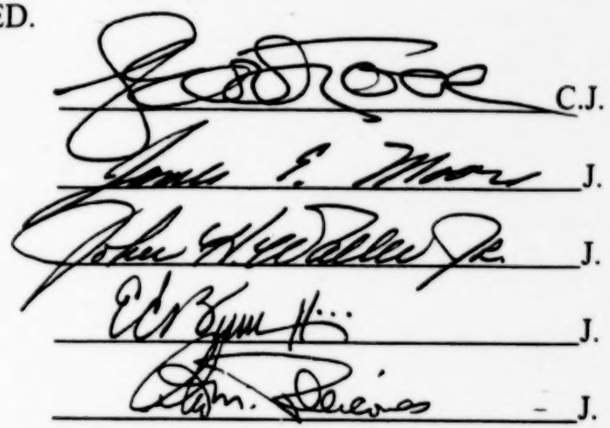
ORDER

This Court affirmed petitioner's conviction and death sentence on direct appeal. State v. Kelly, Op. No. 25226 (S.C. Sup. Ct. filed January 8, 2001) (Shearouse Adv. Sh. No. 1 at 13). Petitioner now asks this Court to stay his execution while he seeks a writ of certiorari from the United States Supreme Court.

Petitioner's request for a stay of execution is granted. This stay shall remain in effect to the extent provided by this Court in In re Stays of

Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996).

IT IS SO ORDERED.



C.J.

J.

J.

J.

J.

Columbia, South Carolina

February 7, 2001

CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 16. CRIMES AND OFFENSES
CHAPTER 3. OFFENSES AGAINST THE PERSON
ARTICLE 1. HOMICIDE

Current through End of 2000 Reg. Sess. and Extra Session of 1999.

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of > Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the

defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United S ates or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:
(1) The murder was committed while in the commission of the following crimes or acts:
(a) criminal sexual conduct in any degree;
(b) kidnapping;
(c) burglary in any degree;
(d) robbery while armed with a deadly weapon;
(e) larceny with use of a deadly weapon;
(f) killing by poison;
(g) drug trafficking as defined in > Section 44-53-370(e), > 44-53-375(B), > 44-53-440, or > 44-53-445;
(h) physical torture; or
(i) dismemberment of a person.
(2) The murder was committed by a person with a prior conviction for murder.
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.
(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.
(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.
(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.
(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.
(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.
(b) Mitigating circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a participant in the defendant's conduct or consented to the act.
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(7) The age or mentality of the defendant at the time of the crime.
(8) The defendant was provoked by the victim into committing the murder.
(9) The defendant was below the age of eighteen at the time of the crime.
(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory

aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. 00-_____

WILLIAM ARTHUR KELLY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari, appendix, and the motion for leave to proceed in forma pauperis in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 3RD day of April, 2001.

ROBERT M. DUDEK
Attorney at Law

SWORN TO BEFORE me this 3rd day
Of April, 2001.

Sandra B. Kirse (L.S.)
Notary Public for South Carolina
My Commission Expires: February 3, 2005

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April 3, 2001

Honorable William K. Suter
Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

Re: William Arthur Kelly v. State of South Carolina

Dear Mr. Suter:

Enclosed are the petition for writ of certiorari and the motion for leave to proceed in forma pauperis in the above-captioned case. The certificate of service is attached to the original petition. Representing the state of South Carolina is S. Creighton Waters, Esquire, of the Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549. His phone number is (803) 734-6305. I represent petitioner William Arthur Kelly, while David I. Bruck is counsel of record. His address is Post Office Box 11744, Columbia, South Carolina 29211. His phone number is (803) 765-1044. The other information required by Rule 29.5 is contained above. If additional information is desired, please contact me.

RECEIVED
APR 5 - 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Sincerely,

Robert M. Dudek
Attorney at Law

RMD\srw

Enclosure

cc: S. Creighton Waters, Esquire

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM ARTHUR KELLY,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

PETITIONER'S QUESTION PRESENTED

Whether the South Carolina courts' refusal to inform Petitioner's sentencing jury that he would never be eligible for parole if the jury sentenced him to life imprisonment rather than to death violated Simmons v. South Carolina, 512 U.S. 154 (1994).

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Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for a Writ of Certiorari to the South Carolina Supreme Court filed by William Arthur Kelly, who has been convicted in the South Carolina courts and sentenced to death. Respondent would show this Court the following:

CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina affirming Petitioner's convictions and sentences is reported as State v. Kelly, 540 S.E.2d 851 (2001). This decision is reprinted in the Appendix to Petitioner's brief at pages 1-18.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on January 8th, 2001. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257, Petitioner having asserted below, and asserting herein, deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-10 et seq. of the Code of Laws of South Carolina, which is reprinted in the Appendix to Petitioner's Brief.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, William Arthur Kelly, is presently confined to the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of

commitment from the Clerk of Court for Lexington County. During the November 1996 term, the Lexington County Grand Jury indicted Petitioner for murder, kidnapping, armed robbery, and possession or display of a knife during the commission of a violent crime. **{R. p. 2099-102}**. On October 14th, 1997 and February 16th, 1998, the state gave notice of intent to seek the death penalty, and on August 13th, 1998, the state served its Notice of Evidence in Aggravation.

The case was called for trial before the Honorable Gary E. Clary and a jury on September 14th, 1998. Public Defender Elizabeth C. Fullwood, H. Wesley Kirkland, Jr., and Hervery Young represented Petitioner at his jury trial. **{R. 1255 ll. 1-2}**. Eleventh Circuit Solicitor Donald V. Myers, Deputy Solicitor Francis A. Humphries, Jr., and Assistant Solicitor Gerald T. Chase were the prosecutors representing the state at trial. On September 17th, 1998, Petitioner's jury convicted him of all four charges.

The sentencing phase of his trial began on September 18th, 1998. After presentation of evidence, Judge Clary submitted the following aggravating factors to the jury:

(1) Murder committed while in the commission of a kidnapping;

(2) Murder committed while in the commission of a burglary;

(3) Murder committed while in the commission of a robbery while armed with a deadly weapon;

(4) Murder committed while in the commission of larceny with use of a deadly weapon;

(5) Murder committed while in the commission of physical torture.

{R. 2071 ll. 8-17}. The following mitigating factors were submitted to the jury:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;

(2) The age of the defendant at the time of the crime;

(3) The defendant was below the age of eighteen at the time of the crime.

Judge Clary also instructed the jurors that they could consider any non-statutory mitigating circumstance. **{R. 2076 ll. 7-18}**.

On September 19th, 1999, Petitioner's jury found the existence of all five (5) aggravating factors and recommended a sentence of death. That same day, Judge Clary sentenced Petitioner to death for murder, to thirty (30) years for armed robbery, and to a consecutive five (5) years for possession of a knife during commission of a violent crime. Since Petitioner was sentenced to death, Judge Clary did not sentence him for kidnapping pursuant to the rule in section 16-3-910 of the Code of Laws for South Carolina. **{R. 2094 l. 18 - 2095 l. 14; 2096 l. 3 - 2097 l. 10}**.

A timely Notice of Appeal was filed and served on September 21st, 1998. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by Assistant Appellate Defender Robert M. Dudek. Assistant Attorney General S. Creighton Waters represented Respondent. Both parties filed briefs in the appeal, and Petitioner presented the following issues relevant to the present Petition for Writ of Certiorari:

I. Whether the judge denied Due Process by refusing to instruct the jury that "life imprisonment" meant imprisonment "until death of the offender", since the state offered evidence of future dangerousness, the solicitor argued future dangerousness, and appellant's request to charge #1 was a correct statement of South Carolina law, was mandated by Simmons v. South Carolina, and the judge had a duty to charge it?

II. Whether the judge erred by refusing to charge, in the alternative, that future dangerousness was not an issue, since the state stipulated that future

dangerousness was not an issue, and appellant was entitled to have that stipulation, defense request to charge #2, heard by the jury?

The South Carolina Supreme Court heard oral argument on September 20th, 2000, and the court issued its opinion affirming Petitioner's conviction and sentence on January 8th, 2001. State v. Kelly, 540 S.E.2d 851 (S.C. 2001). On January 23rd, 2001, Attorney Dudek filed on behalf of Petitioner a "Petition for Stay of Execution". The Remittitur was sent down on January 24th, 2001. On January 25th, 2001, the state filed a letter Return in which it did not object to Petitioner's requested stay of execution. The South Carolina Supreme Court on February 7th, 2001 granted the motion for stay of execution.

Petitioner sent his Petition for Writ of Certiorari to the United States Supreme Court on April 3rd, 2000, and this Petition was docketed on April 5th, 2000.

RESPONDENT'S STATEMENT OF FACTS

Although the defense requested and the judge gave a charge on voluntary manslaughter at trial, it is undisputed that Petitioner brutally killed 25-year-old Shirley Slade Shealy by stabbing her over thirty (30) times at a Kentucky Fried Chicken (KFC) restaurant in Batesburg.

A. Background

Shealy was the manager of the Batesburg KFC up until the time of her death. Petitioner was Shealy's former employee who worked at the KFC from February 27th, 1995, until December 8th, 1995. **{R. 1257 l. 9 - 1258 l. 5; 1490 ll. 6-19; 1501 l. 23 - 1502 l. 10}**. Shealy and Petitioner's family knew each other fairly well; indeed, Shealy and Petitioner's older sister were best friends. **{R. 1857 l. 4-12; 1902 l. 21 - 1905 l. 18}**. Shealy was married with one young son, Alex, and at the time of her death she was about six months'

pregnant with her second child, Sidney Bruce Shealy. **{R. 1849 l. 2 - 1850 l. 6; 1858 ll. 3-7; 1874 l. 20 - 1876 l. 20}**.

B. Guilt Phase

Petitioner spent the afternoon and early evening of January 5th, 1996 hanging out at the KFC with his former co-workers, including Shealy. Petitioner left the KFC between 6:00 and 8:30 p.m. **{R. 1259 l. 14 - 1260 l. 1; 1379 ll. 7-23; 1492 l. 7 - 1493 l. 2}**.

At about 10:25 p.m., Shealy and her co-worker Barbara Adams closed and locked up the KFC. Before they left, Shealy locked the money taken in that afternoon and evening into a floor safe in the KFC's office. Adams had to wait for her car to warm up, and Shealy drove out of the parking lot towards her home. Adams never saw Shealy alive again. **{R. 1260 l. 2 - 1267 l. 25; 1270 ll. 11-13}**.

Somewhere between 10:00 and 11:00 p.m. that night, Jason Hite was riding by the KFC with a friend. Hite noticed a car parked at an angle in the KFC's lot with its headlights on and its driver's side door open. **{R. 1277 l. 9 - 1281 l. 22}**. In his statement to police, Hite said he saw the victim walking up to the door. **{R. 1283 l. 14 - 1284 l. 12}**.

A little later, Officer Stephen Clare of the Batesburg-Leesville Police Department drove past the KFC while patrolling the area. Officer Clare became suspicious when he saw Shealy's car with its driver's door open and the motor running. As he pulled into the KFC's lot, he noticed what appeared to be someone ducking down in the area of the manager's office. Clare got out of his cruiser, went to the front door, and found it unlocked. He entered the KFC, and discovered Shealy's body amidst a bloody scene. Concerned that the perpetrator might still be inside, he exited the KFC, called for backup, and

attempted to cover the exterior of the building by himself. **{R. 1285 l. 7 - 1295 l. 7}**.

Backup arrived shortly, but the officers found no one when they cleared the building. **{R. 1294 ll. 1-12}**. While they were clearing the building, Chief Oswald of the Batesburg-Leesville Police Department checked the victim, but she was already dead. **{R. 1324 l. 16 - 1326 l. 18}**. When she was found, Shealy's hands were bound behind her back with duct tape. There was also an overturned chair covered with blood that had duct tape on it. A piece of an opaque latex glove was found attached to the duct tape, and a bloody dive knife was found on a rack in the kitchen. Over $1000 in cash was scattered throughout the scene, including a number of bills found stuck to the victim with her own blood. When the floor safe was later opened, it was virtually empty except for a ripped deposit bag and a deposit slip. **{R. 1292 l. 14 - 1293 l. 15; 1302 ll. 2-25; 1337 l. 20 - 1339 l. 23; 1423 l. 16 - 1442 l. 1; 1510 l. 2 - 1511 l. 21; 1565 ll. 19-25}**.

Large amounts of blood spatter throughout the kitchen and hallway of the restaurant indicated a struggle and repeated violent blows during Petitioner's sustained assault on Shealy. **{R. 1437 l. 18 - 1449 l. 19}**. The pathologist, Dr. Sexton, testified that there were thirty-one (31) stab or incision wounds to Shealy, including around twenty (20) wounds to her back. Petitioner also slit Shealy's throat from ear to ear, severing both her jugular vein and her airway. As noted before, Shealy's hands were bound behind her back, and consequently she had no defensive wounds. **{R. 1560 l. 12 - 1570 l. 13}**.

Near the victim's car, the officers found a page from a child's coloring book lying on the ground. The officers noticed that most of the assorted items inside the victim's car had been shoved over onto the backseat floorboard on the passenger side. Suspiciously, the

backseat floorboard on the driver's side was relatively clear, except for some coloring book pages which were mashed down as if someone had been lying on them. **{R. 1295 ll. 8-14; 1331 l. 9 - 1333 l. 11; 1451 l. 13 - 1454 l. 19}**.

Investigating officers also noticed that while the KFC's rear door was locked the drive-thru window was unlocked. **{R. 1328 l. 18 - 1330 l. 18; 1450 ll. 5-11}**. A SLED bloodhound picked up a trial running away from the KFC, over a fence, and into a grassy lot near a dumpster. In the lot, police found a tire spin-off mark. **{R. 1310 l. 8 - 1320 l. 20; 1334 l. 17 - 1335 l. 16}**.

Police promptly started interviewing KFC employees and others who were at the KFC on January 5th. Eventually, they attempted to contact Petitioner, but they found out he did not come home that night. Petitioner's mother filed a missing persons report on Petitioner the next day. **{R. 1335 l. 20 - 1337 l. 7}**.

The break in the case came on the afternoon of January 8th, when Petitioner's mother contacted Chief Oswald and told him Petitioner was at his sister's house in Lowell, Massachusetts. Oswald then called Lowell police and gave them the sister's address and a description of Petitioner. **{R. 1340 l. 4 - 1341 l. 17; 1353 l. 23 - 1354 l. 24}**. There, Lowell police found Petitioner, who orally admitted to the murder. The Lowell police then took Petitioner to the station, where he gave and signed a written statement. Petitioner claimed he had to stab Shealy because she kept trying to have sex with him. **{R. 1358 l. 2 - 1364 l. 25; 1365 l. 20 - 1374 l. 3}**.

When Lowell police searched Petitioner, they found $90 in cash stained with Shealy's blood. **{R. 1387 ll. 8-10; 1470 ll. 13-22; 1555 ll. 20-24}**. Petitioner's car also

contained his pants, T-shirt, and shoes covered in the victim's blood. **{R. 1462 l. 25 - 1464 l. 21; 1556 ll. 4-11}**. Finally, sneakers found in Petitioner's car matched bloody footprints found at the scene. **{R. 1475 l. 19 - 1476 l. 19}**.

Further proof of Petitioner's robbery plan came from employees of the KFC, who testified that it was common knowledge among employees that money taken in after late afternoon was kept overnight in the floor safe. **{R. 1258 ll. 6-20; 1490 l. 17 - 1491 l. 22}**. The employees also testified that the knife, duct tape, and latex gloves used by Petitioner were not of the type normally used by the KFC. **{R. 1268 l. 1 - 1270 l. 6; 1495 l. 13 - 1497 l. 15; 1500 l. 1 - 1501 l. 22}**.

The defense rested without presenting a case.

C. Penalty Phase

The state presented testimony and evidence from Dr. Sexton and SLED crime scene analysts about Petitioner's exceptionally brutal and prolonged assault on Shealy, who, as noted before, was six months' pregnant. **{R. 1802 l. 1 - 1819 l. 25; 1823 l. 10 - 1840 l. 22}**. Dr. Sexton testified that Shealy's baby was healthy and normal, and might have even survived had it been born at the time of the mother's death in a hospital setting. **{R. 1840 l. 23 - 1842 l. 22}**. The state also presented victim impact testimony from family members about the devastating effect Shealy's death had on her husband, young son, parents, in-laws, and siblings. **{R. 1848 l. 4 - 1880 l. 5}**.

Jail guards testified about Petitioner's behavior in prison, including an incident where Petitioner refused to obey orders. **{R. 1666 ll. 17-25}**. Petitioner also was in a small cell with two others where correctional officers discovered that the mortar around a cinder block

had been dug away. The inmates attempted to conceal the work by stuffing colored toilet tissue in the cracks. **{R. 1671 l. 19 - 1677 l. 20; 1695 l. 4 - 1701 l. 18; 1717 l. 5 - 1720 l. 23}**.

Petitioner also told a fellow inmate that he and the victim were staging a robbery, but he overheard her turning him in so he tried to decapitate her with the knife. The inmate also testified that Petitioner frequently talked of escape and even targeted a particular slightly-built female guard as his hostage. One time, Petitioner hid a shank in his hand when he called the guard over to the cell door, but he ultimately backed out of his escape plan. **{R. 1736 l. 2 - 1746 l. 6}**. A correctional officer confirmed finding on Petitioner a shank made from a toothbrush and a metal object. **{R. 1761 ll. 9-16}**.

Another former inmate testified that Petitioner bragged about his crime, asked other inmates to call him "KFC," and talked about taking a nurse hostage. **{R. 1769 l. 18 - 1771 l. 9}**. Petitioner carried a styrofoam cup on which he had drawn a knife, a decapitated chicken, and the words "KFC". **{R. 1747 ll. 4-22; 1771 ll. 10-22}**.

The defense case began first with evidence that Petitioner had no history of significant criminal convictions or juvenile adjudications. **{R. 1886 ll. 8-18; 1888 ll. 6-15}**. Petitioner's mother testified that he had a normal childhood and even did well academically until high school, when his grades went bad and he started getting into trouble. **{R. 1893 l. 6 - 1903 l. 6}**.

A defense psychologist stated that Petitioner has average intelligence and no mental illnesses. The most the psychologist could say is that Petitioner might have been on his way to an alcohol problem. According to the psychologist, Petitioner is adaptable

to prison, and Petitioner's possession of a shank, talk of escape, and drawing of a decapitated chicken was just the typical "puffing" often done by younger, smaller-built inmates. **{R. 1911 l. 22 - 1926 l. 9}**. On cross-examination, the psychologist admitted that Petitioner has violent fantasies of getting away with killing people who have wronged him, and that he had tortured and killed small animals. **{R. 1926 l. 20 - 1928 l. 15; 1958 l. 25 - 1959 l. 11}**.

Former warden James Aiken also testified Petitioner was adaptable to prison life and easily managed and contained by the South Carolina Department of Corrections. Aiken theorized that Petitioner might be victimized in the harsh world of prison. **{R. 1971 l. 1 - 1996 l. 17}**.

REASONS WHY CERTIORARI SHOULD BE DENIED

Since the prosecution did not rely on Petitioner's future dangerousness as a basis for death, there was not due process right of rebuttal with information about the unavailability of parole; in any event, the defense closing argument satisfied the rule in Simmons v. South Carolina.

Since the unavailability of parole does nothing to rebut arguments that Petitioner will be an escape threat or will be dangerous in the future to other inmates or prison staff, the South Carolina Supreme Court properly ruled that Simmons's[1] due process right of rebuttal was not triggered. Further, the prosecution's other evidence and argument in this case did not rely or raise future dangerousness as a basis for death; thus, the first prong of Simmons was not satisfied and due process did not require a life without parole charge. Finally, there is a distinction between merely pointing out a defendant's other bad acts and

[1] Simmons v. South Carolina, 512 U.S. 154 (1994).

expressly relying on future dangerousness as a basis for death, and the former does not trigger application of the rule in Simmons.

A. How the federal question was raised and decided below

1. Events at trial

Before arguments, the defense requested the judge charge from S.C. Code § 16-3-20(A) that a life sentence meant "until death of the offender", and cannot be reduced by parole, community supervision, any type of work or early release program, or any type of credits. After the solicitor stated that there were no Simmons issues because he was not going to argue future dangerousness, the defense asserted the state had in fact raised future dangerousness through evidence of escape attempts, a plan to take a guard hostage, and cross-examination of the defense experts on jail records. In response, the solicitor stated that those only went to past conduct, and he did not bring in a mental health expert to testify Petitioner would be dangerous in the future. The solicitor also noted the distinction under Simmons between danger to those inside prison and danger to outside society. Later the defense argued that due process required the charge so that the defense could rebut the state's evidence, and show a basis for a sentence less than death. The trial court ultimately ruled that the future dangerousness prong of Simmons had not been met, and denied the request to charge. **{R. 2000 l. 25 - 2004 l. 11; 2007 ll. 12-24; 2011 l. 22 - 2013 l. 12}**.

After the trial court denied the defense's request for the verbatim charge from subsection 16-3-20(A), Petitioner asked for a plain and ordinary meaning charge. Petitioner also requested a charge that the state had stipulated future dangerousness was

not an issue in the sentencing proceeding. The court denied the latter request. **{R. 2007 l. 25 - 2009 l. 20}**.

The defense objected on a few occasions that the solicitor was arguing future dangerousness during the state's closing. **{R. 2037 ll. 8-23; 2039 l. 10 - 2040 l. 6}**. During their closing, defense counsel repeatedly stressed that Petitioner would be in prison for the rest of his life. **{R. 2049 ll. 17-22; 2051 ll. 6-9; 2056 ll. 10-12; 2060 ll. 7-11}**. The judge gave the jury a plain an ordinary meaning charge. **{R. 2069 ll. 2-4}**. After the charge, defense counsel renewed her request for a charge from subsection 16-3-20(A), or, in the alternative, for a charge that the state had stipulated future dangerousness was not an issue. **{R. 2082 ll. 22-25}**.

2. The direct appeal to the South Carolina Supreme Court

In State v. Kelly, the South Carolina Supreme Court found that the Simmons rule was not triggered because the prosecution had not raised future dangerousness:

> To be entitled to a Simmons charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to death is life imprisonment without possibility of parole. Id. at 178 (O'Connor, J., concurring); see also State v. McWee, 322 S.C. 387, 391-92, 472 S.E.2d 235, 238 (1996) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence"). Kelly has not met either prong of the Simmons test.
>
> First, we agree with the trial court that the State's evidence at sentencing did not implicate future dangerousness. Evidence that Kelly took part in escape attempts and carried a shank simply is not the type of future dangerousness evidence contemplated by Simmons. [FN8]
>
> FN8. When the State argues future dangerousness, it "urge[s] the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison." Simmons,

512 U.S. at 163 (emphasis added).

The underlying principle of the Simmons holding is that if evidence of future dangerousness is presented by the State, the defendant must be allowed to rebut this evidence by showing that he will never be eligible for parole, i.e., that he will never legally be let out of prison. In the instant case, however, Kelly argues that the evidence he is an escape threat (and thus a risk to the general public) required that the jury be instructed on parole ineligibility. The flaw in Kelly's argument is that a Simmons charge would not rebut this evidence. Telling a jury that a convicted murderer will never be eligible for parole simply does not respond to the State's evidence that he presents an escape risk.

In our opinion, the evidence presented by the State in the penalty phase was designed to show that Kelly would not adapt to prison life because in jail he had been caught carrying a weapon and planning or participating in escape attempts. Kelly was allowed to rebut this evidence, through both cross- examination of the State's witnesses and the witnesses presented in his defense. [FN9]

> FN9. Kelly presented expert testimony from a clinical psychologist, Dr. Steven Shea, and a correctional management consultant, James Aiken. Dr. Shea testified that Kelly could adjust to prison. Aiken testified that Kelly could be "adequately managed, housed and secured without endangerment in a correctional facility within the South Carolina Department of Corrections."

Thus, Kelly was given the opportunity to deny or explain the State's evidence, in accordance with due process requirements.

Kelly further contends that the State argued future dangerousness to the jury and thus misled the jury in violation of his due process rights. Specifically, Kelly argues that the State's argument that Kelly is worse than a serial killer and that "murderers will be murderers" constituted argument on future dangerousness. We disagree. A fair reading of the State's closing argument shows that the State consciously avoided any implication of future dangerousness. Not once did the State suggest to the jury that it should impose the death penalty because Kelly would be a future danger to the general public. Cf. Simmons, supra (where the Court found the following arguments to be generalized argument of future dangerousness: "what to do with [petitioner] now that he is in our midst" and that the death penalty would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense"). Instead, the State argued Kelly should be given the death penalty primarily as retribution for the heinous nature of the murder

and because of the status of Shealy, the pregnant victim.

> We hold that future dangerousness was not an issue in this case. It was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument.

The Kelly court also went on to hold in the alternative that the Simmons rule was not triggered because at the time of the judge's charge a thirty year definite term sentence was a possibility, and life without parole was not the only available alternative sentence to death. Kelly, 540 S.E.2d at 857-58. This alternative rationale has since been overruled by this Court's decision in Shafer v. South Carolina, 121 S.Ct. 1263 (2001).

A. Simmons is not triggered by prosecution argument as to a defendant's future dangerousness to other prisoners and prison staff, because information about the unavailability of parole does nothing to rebut such arguments.

The South Carolina Supreme Court ruled that evidence of and argument about Petitioner's misconduct while in pretrial detention did not trigger Simmons, because the unavailability of parole does nothing to rebut evidence showing Petitioner's future dangerousness *while in prison*. Kelly, 540 S.E.2d at 857. Petitioner contends that there is no basis in law or logic for the "inside prison/outside society" distinction. He is incorrect.

The Simmons rule is based in the due process right of a capital defendant to rebut the state's evidence in aggravation. 512 U.S. at 164-65 (discussing Skipper v. South Carolina, 476 U.S. 1 (1986), and Gardner v. Florida, 430 U.S. 349 (1977)). The idea is that "when the State seeks to show future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case". Simmons, 512 U.S. at 177 (O'Connor, J., concurring). Future dangerousness argument was defined as "urg[ing] the jury to sentence the defendant to

death so that he will not be a danger to the public *if released from prison*". Simmons, 512 U.S. at 163 (emphasis added). Indeed, the Simmons plurality noted its due process concern was that "there may be no greater assurance of a defendant's future nondangerousness *to the public* than the fact that he never will be released on parole". Id. at 164 (emphasis added).

Thus, the rationale is obvious for distinguishing between argument about future dangerousness to the public, which would trigger Simmons, and argument about dangerousness while inside prison, which would not: whether or not the defendant may be released from prison on parole is irrelevant if the prosecutor is only arguing that the defendant will be an escape threat or will be dangerous to other inmates and prison staff. Since life without parole does absolutely nothing to respond to dangerousness inside prison, there is no corresponding due process right of rebuttal.

This "inside prison/outside society" distinction finds its authorization in both the plurality and concurring opinions of Simmons itself. See Simmons, 512 U.S. at 165 n.5 ("Of course, the fact that a defendant is parole ineligible does not prevent the state from arguing that the defendant poses a future danger. The state is free to argue that the defendant will pose a danger to . . . inmates or prison staff.") (plurality); 512 U.S. at 177 ("Of course, in such cases the prosecution is free to argue that the defendant would be dangerous in prison.") (concurrence). The appropriateness of this distinction is further supported by the fact that both the plurality and the concurring opinions made much of the testimony in Simmons that the defendant was only dangerous to elderly women and thus would not pose a threat to the men in prison. 512 U.S. at 157-58, 176.

Further, other jurisdictions have also applied or recognized the distinction between

"inside prison" and "outside society" future dangerousness evidence or argument. United States v. Flores, 63 F.3d 1342, 1368 (5th Cir. 1995) (focus on danger in prison makes case "materially different" from Simmons); Allridge v. Scott, 41 F.3d 213, 221-22 (5th Cir. 1994); State v. Richmond, 495 S.E.2d 677 (N.C. 1998); Collier v. State, 959 S.W.2d 621, 623 (Tex. Crim. App. 1997) (en banc).

Finally, Petitioner contends evidence that he was dangerous inside the highly restrictive environment of prison is *necessarily* evidence that Petitioner would be more dangerous in the free climate of society, regardless of how the prosecution argues the evidence. Surely, prison is a more restrictive environment than society; however, it is common sense that a prison is a far more dangerous and violent place than the Petitioner's small hometown of Batesburg, South Carolina, or most any other residential neighborhood in the country. It cannot simply be assumed that people necessarily behave *better* in a maximum security lockup than they would in free society, so that if they are dangerous in prison they must necessarily be more dangerous in society. The South Carolina Supreme Court was thus correct in concluding that such evidence went to show Petitioner was not adaptable to prison, and not to prove his future dangerousness to the general public. See Kelly, 540 S.E.2d at 857.

Indeed, the defense presented expert evidence that Petitioner's possession of a shank, talk of escape, and drawing of a decapitated chicken was just the typical "puffing" often done by younger, smaller-built inmates. **{R. 1911 l. 22 - 1926 l. 9}**. Thus, the mitigation evidence was that prison was *causing* Petitioner to behave violently, not that its more restrictive environment caused him to behave.

Since a life without parole alternative sentence does not rebut evidence about Petitioner's misbehavior in prison, the South Carolina Supreme Court properly ruled that Simmons was not triggered.

B. The prosecution's evidence and argument in this case did not raise future dangerousness.

Petitioner next argues that the state's other argument and evidence raised future dangerousness.

1. "A little more dangerous . . ."

Petitioner first points to the following statement of the prosecution in argument:

> SOLICITOR: Mercy? Mitigation? If you find it, folks, speak it out for what he's done. And, you know what, what did his own witness say. He doesn't have any mental illness. He's intelligent. He's not retarded. He's quick-witted. *Doesn't that make somebody a little more dangerous—*
>
> DEFENSE ATTORNEY: Objection, Your Honor.
>
> THE COURT: Just a moment. Yes, ma'am. State your grounds.
>
> DEFENSE ATTORNEY: The Solicitor has stipulated dangerousness is not an issue—
>
> SOLICITOR: *—For this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy.* When you let your guard down and they stab you in the back. That's what we have here. That's what we do know. That's what he did. He made his own mother admit that. He made his own family victims.

{R. 2037 ll. 8-23} (emphasis added).

Respondents argued to the state supreme court that since the trial court never ruled on this objection, and Petitioner never subsequently mentioned this passage at trial as a basis for a life without parole charge, then consideration of it was not preserved for appeal. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (issues not raised or ruled upon

below are not preserved for review). The state court opinion mentioned the passage in its description of the facts, but never addressed it in its analysis. Kelly, 540 S.E.2d at 856-57. As such, consideration of it is not preserved for review before this Court. See generally Stembridge v. Georgia, 343 U.S. 541 (1952); Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, it is true the solicitor stated "doesn't that make somebody more dangerous." However, in the very next statement the solicitor *immediately* tied his "dangerous" comment into the particular crime committed against Shealy. **{R. 2037 ll. 18-20}**. The statements were part of the solicitor's argument that Petitioner facilitated his plan of robbery and murder by preying on a good friend of his family likely to trust him. The solicitor also was pointing out that Petitioner was under no mental illness or mental deficiency which might mitigate his punishment. These statements referred to the crime already committed and did not raise future dangerousness to society. See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing).

2. "Bloody Billy"

Next, Petitioner asserts future dangerousness argument from the following passage:

> Stabbing her while you're down. Kick her while you're down. Keep on plunging, keep on slicing, hacking, *bloody Billy, the butcher of Batesburg*—
>
> DEFENSE ATTORNEY: Objection to the inflammatory nature, your Honor—
>
> THE COURT: Just a—
>
> DEFENSE ATTORNEY: Objection to the inflammatory nature of that

> argument.
>
> THE COURT: Overruled.
>
> THE SOLICITOR: *Bloody Billy and the butcher of Batesburg* and he wants mercy—
>
> DEFENSE ATTORNEY: Objection to the reference of—
>
> THE COURT: Just one moment, Solicitor.
>
> DEFENSE ATTORNEY: Objection to the referral as Bloody Billy.
>
> THE COURT: I'll sustain the objection and ask that the jury disregard that statement. That it be stricken from the record.
>
> THE SOLICITOR: They call him Billy. Let me show you something, folks. What do you see in these pictures? Does that connect the two? But they want you to think of him as Little Billy. *Little Billy, the kid. I know another Billy, the kid, that he reminds me of.* He's not a kid. He's a killer. And he committed a man-sized crime and he needs a man-sized punishment. That's what we are dealing with. And he butchered her. There's no doubt about it. And he's from Batesburg. So if you want to put those two together, you say it if I can't, the butcher of Batesburg.
>
> DEFENSE ATTORNEY: Objection, again, Your Honor.
>
> THE COURT: Sustain the objection.
>
> THE SOLICITOR: That's what he is.
>
> THE COURT: Ladies and gentlemen of the jury, please disregard the Solicitor's comment. It is stricken from the record.

{R. 2035 l. 15 - 2036 l. 24}.

Respondents argued to the state supreme court that Petitioner did not preserve any alleged Simmons issues with these comments, because: (1) Petitioner only objected to the "Bloody Billy" statement as inflammatory, (2) he did not subsequently argue to the trial court that the solicitor went too far into the realm of future dangerousness with these

statements, and (3) the trial court sustained the objection and struck the comment, and Petitioner did not request any further relief. See generally State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995) (party cannot argue one ground below and another on appeal); State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993) (ground asserted on appeal must be supported by objection raised at trial). In its opinion, the state supreme court did not mention any of the above-quoted passage during either its description of the facts or its analysis. Kelly, 540 S.E.2d at 856-57. As such, consideration of it is not preserved for review before this Court. See Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, the statement "Bloody Billy, butcher of Batesburg" in no way reflected on future dangerousness but merely emphasized the brutal nature of Petitioner's crimes. It followed the solicitor's graphic description of the attack on Shealy. **{R. 2035 ll. 3-17}**. Whether the reference was inflammatory is not an issue on appeal. However, the statement was based in the evidence, because the crime was exceptionally bloody, and Petitioner stabbed Shealy so repeatedly and deeply that "butchering" is a fair word. Cf. United States v. Pungitore, 910 F.2d 1084 (3rd Cir. 1990) (reference to defendants as "cold-blooded killers" and "mob killers" fair comment on the evidence). The statement referred to the crime Petitioner had already committed and did not raise future dangerousness. See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing).

3. "Murderers will be murderers . . ."

Petitioner next mentions portions of the solicitor's discussion on Petitioner's behavior in jail. After stating that Petitioner had learned from his "mentor," jailhouse informant Matthew McCormack, the solicitor commented on the fact that Petitioner did not report the digging of the mortar around a cell's cinder block. The following then occurred:

> SOLICITOR: Oh, no. He doesn't have anything to do with it and that toothbrush he had with the metal tip in it, oh, that's just being a big man, to clean his fingernails. That's not to hurt anybody, not Ms. Marsha Price, the lady everybody says—
>
> DEFENSE ATTORNEY: Objection, Your Honor. He's — I think he's going afield to what we stipulated to on the future problems.
>
> SOLICITOR: I am talking about—
>
> THE COURT: Solicitor, if you would, please limit your argument to what we discussed, sir.
>
> SOLICITOR: I am talking about what happened from the witnesses who testified on this stand. And didn't you hear a woman named Marsha Price who worked at the Lexington County Jail. Didn't they say that she was the one most gullible, the one you could take hostage? Didn't you hear he had that shank behind his back calling her to the door—
>
> DEFENSE ATTORNEY: Objection, Your Honor—
>
> SOLICITOR: —If you didn't hear that, disregard it—
>
> DEFENSE ATTORNEY: This is going outside the scope of the situation.
>
> THE COURT: Overruled—
>
> DEFENSE ATTORNEY: —Stipulation—
>
> THE COURT: Overruled.
>
> SOLICITOR: If you didn't hear somebody testify to that, folks, you hold it against me and not against the family out here, please. But I swear I heard that from the stand. But you take it as you heard it. That's just shanks will be shanks. And murderers will be murderers. And he is the cold-blooded

one right over there.

{R. 2038 l. 20 - 2040 l. 12}.

The state supreme court correctly found that the statements did not address future dangerousness to society as a whole. Kelly, 540 S.E.2d at 857. The "murderers will be murderers" statement clearly related to Petitioner's plan to take a guard hostage while in pretrial detention. Assuming the statement did raise future dangerousness, it went solely to Petitioner's future dangerousness in prison and lack of adaptability to prison life, which, as argued before, did not trigger Simmons.

4. "More frightening than a serial killer . . ."

Petitioner next points to the following argument:

> SOLICITOR: No prior convictions of violence against another person; below the age of eighteen. You know something, a person that commits an uncharacteristic and an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal. Is that person uncharacteristicall [sic], because he hadn't done it before? You kind of trust them a little bit.
>
> Unpredictably because of his age. You don't think they will do anything. Those people are supposed to be kind, supposed to be your friend, supposed to be nice; supposed to be kind. Well, that's the kind that while they are hugging you with kindness, they're getting ready to kill you with kindness. Does that go in his favor—
>
> DEFENSE ATTORNEY: Objection, Your Honor—
>
> THE COURT: Yes, Sir.
>
> DEFENSE ATTORNEY: —Inflammatory.
>
> THE COURT: Overruled.

{R. 2029 l. 13 - 2030 l. 4}.

The state supreme court found that the statements did not address future

dangerousness to society as a whole, and that they suggested death was appropriate because of the heinous nature of the murder and the status of Shealy as a friend of the family and pregnant woman. Kelly, 540 S.E.2d at 857.

This argument was the solicitor's challenge to the mitigating factor of the defendant's age. Indeed, rather than say Petitioner was a future danger, the solicitor called his crime uncharacteristic, and by implication said Petitioner was NOT a career criminal or serial killer. Moreover, the solicitor was arguing about the circumstances of Petitioner's crime, that he stalked and killed a close family friend who would have been more trusting and vulnerable. Thus, the argument did not raise future dangerousness but merely highlighted the callous premeditation of Petitioner's past crimes. See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing). Future dangerousness was not implicated.

Finally, Petitioner asserts the prosecution raised future dangerousness with the solicitor's cross-examination of defense experts on Petitioner's obsessive thoughts of killing people and his history of torturing and killing small animals. **{R. 1927-28; 1959}**. Petitioner did not object to this cross-examination at trial, and did not assert it as a reason why the prosecution had raised future dangerousness. Petitioner also did not mention this cross-examination in his brief to support his position before the state supreme court, and the state supreme court did not address nor refer to this cross-examination in either its description of the facts or its resolution of the Simmons issue. Kelly, 540 S.E.2d at 857. Therefore, consideration of it is not preserved for review before this Court. See Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not

raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, the defense stated the witness's only purpose was to testify as to adaptability to prison, and when the cross-examination is read in context, it is clear it was directed towards challenging the witness's opinion that Petitioner was adaptable. **{R. 1935 ll. 4-7; 1909-62}**. As noted before, the Simmons rule is based in the due process right of rebuttal to the prosecution's raising of future dangerousness as a basis for death. 512 U.S. at 164-65. The prosecution cannot be viewed as having raised future dangerousness before the jury as a basis for death, and thereby creating a corresponding right of rebuttal, when the prosecution merely cross-examined the defense's mental health expert on how relied-upon information in the mental health records affected the expert's opinion about adaptability to prison.

Further, most of the cross-examination focused on Petitioner's possession of a shank, plan to take a guard hostage, and Petitioner's likely experience in prison. **{R. 1927-59}**. At worst, the cross-examination did not trigger Simmons because it went to future dangerousness in prison.

Finally, Petitioner contends that the evidence in argument in this case raised future dangerousness more explicitly than anything in Simmons itself. This is incorrect. In Simmons, expert witnesses from the prosecution stated that Simmons posed a continuing risk to elderly women. The prosecution in the present case put up no such witnesses. In Simmons, the prosecutor told the jury that a death sentence would be "the response of society to someone who is a threat", and that the death verdict would be an act of "self-defense". Such statements are obviously patent references to the defendant's future

dangerousness and his continuing danger to society as a whole. No such argument was made in this case.

Since the prosecution in this case did not raise Petitioner's future dangerousness to society as a whole as a basis for death, the South Carolina Supreme Court correctly ruled that the rule in Simmons was not triggered.

C. There is a distinction between an express future dangerousness case and merely pointing out the defendant's other bad conduct; in order for a due process right of rebuttal to be triggered, the state must raise Petitioner's future dangerousness to society.

Finally, Petitioner seems to challenge the premise that future dangerousness argument by the prosecution, or at least some express reliance on future dangerousness by the prosecution, is necessary to satisfy the first prong of the Simmons test. Petitioner contends there is no difference between pointing out a defendant's other prior bad acts, and asserting his continued dangerousness is a basis for death.

Such a view is as odds with this Court's expression of the Simmons rule. See Ramdass v. Angelone, 120 S.Ct. 2113, 2117 (2000) (plurality opinion) (state submitted to the jury a future dangerousness aggravating circumstance); 120 S.Ct. at 2126 (concurring opinion) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (dissenting opinion) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). See also Simmons, 512 U.S. at 162 ("grievous misperception" encouraged by "state's repeated suggestion that petitioner would pose a future danger to society); 512 U.S. at 163 (prosecutors in South Carolina often emphasize a defendant's future dangerousness in their evidence and

argument, and they urge the jury to sentence the defendant to death so he will not be a danger to the public if released); 512 U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .").

If Petitioner is correct that the state raises future dangerousness by merely introducing evidence in the sentencing phase about a capital defendant's past criminal conduct and bad acts, then the future dangerousness prong of Simmons would be superfluous and Simmons would apply to every capital case where the only alternative sentence to death was life without parole. Indeed, introduction of the charged crime's circumstances itself would thereby automatically raise future dangerousness. Justice O'Connor flatly rejected such a view in Simmons:

> "Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death" is life without parole.

512 U.S. at 175 (O'Connor, J., concurring). Similarly, the Simmons plurality also implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)). Further, both the Simmons plurality and Justice O'Connor in concurrence recognized that the state could legitimately argue that the defendant would be a future danger to other inmates and prison staff, without triggering the rule in Simmons. 512 U.S. at 165 n. 5; 512 U.S. at 177.

It is *the use to which the prosecution puts the evidence* which triggers the due process right of rebuttal in Simmons. See Skipper v. South Carolina, 476 U.S. 1, 5 n. 1 (1986) (noting that the relevance of probable future conduct in prison is underscored by the prosecution's argument, which urged the jury to return a death sentence because the defendant could not be trusted in prison, and noting that the due process right of rebuttal is triggered when the "prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty"). A number of other jurisdictions have also noted the distinction between pointing out a defendant's character and other bad acts, and raising future dangerousness. See State v. Bey, 736 A.2d 469 (N.J. 1999) ("prior murder" aggravator did not raise future dangerousness); State v. Bey, 709 N.E.2d 484 (Ohio 1999) (prosecutor did not raise future dangerousness by reviewing evidence of defendant's character, background, and history in response to adaptability evidence); Commonwealth v. May, 710 A.2d 44, 47 (Pa. 1998) (evidence of prior criminal conduct does not necessarily raise future dangerousness). Indeed, there are many types of evidence known to law which are admitted for one purpose but not another. See, e.g. Fed. R. Evid. 404(b).

Finally, prosecutors are not simply putting on a dangerousness case and calling it a different name, as Petitioner contends. There is simply a large difference between merely pointing out the bad things a defendant has done in addition to the charged murder, and: (1) putting up mental health experts to testify that in their opinion Petitioner will be a future danger, or (2) submitting to the jury an express future dangerousness aggravator, or (3) having the prosecutor pound the podium and tell the jury, "You must put this defendant to death or he will kill somebody in society again in the future". The latter are

types of an express future dangerousness case to which the rule in Simmons was aimed.

The South Carolina Supreme Court properly applied the test set forth in Simmons, and correctly ruled that evidence and argument about Petitioner's other bad conduct did not amount to the prosecution specifically relying on Petitioner's future dangerousness asa a basis for death. Since the prosecution did not use future dangerousness to society, due process did not require rebuttal with information about the unavailability of parole. Certiorari should be denied.

D. The rule in Simmons was satisfied by the defense argument about the finality of a life sentence.

Even if this Court finds *Simmons* was triggered, the defense's closing argument and the judge's charge fulfilled the requirements of *Simmons*.

Simmons stated that its mandate would be satisfied if information about the defendant's parole ineligibility is presented to the jury through *either* an instruction from the court or argument of defense counsel. 512 U.S. at 169, 177.[2]

In his sentencing phase closing, Petitioner's counsel repeatedly told or implied to the jury that Petitioner would never leave prison if he received a life sentence. **{R. 2049 ll. 17-22; 2051 ll. 6-9; 2056 ll. 10-12; 2060 ll. 7-11}**. In addition, Petitioner's counsel said that "a wife and a kid and car" would "never happen for Billy Kelly, ever", that life in prison was a "slow death", and that Petitioner would "never see the light of daylight again". **{R. 2049 ll. 17-22; 2051 ll. 6-9; 2056 ll. 10-12; 2060 ll. 7-11}**. When combined with the judge's charge that life imprisonment was to be understood in its plain and ordinary meaning, the defense arguments prevented the jury from being faced with the "false dilemma" condemned by Simmons. 512 U.S. at 171.

Thus, there was no due process violation, and certiorari should be denied.

[2] In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *overruled on the grounds in State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), the South Carolina Supreme Court held that trial courts had to give life without parole instructions if the *Simmons* 2-prong test was met and the defendant requested such an instruction. However, the issue before this Court in the present case concerns only the federal constitutional mandate in *Simmons*, and not any purely state law expansion of the rule.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

By: _____

May 7th, 2001

*Counsel of Record

No. 00-9280

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

WILLIAM ARTHUR KELLY,

Petitioner,

vs

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, S. Creighton Waters, who being duly sworn, deposes and says that he served the foregoing **Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina** on the Petitioner by depositing two (2) copies of the same in the United States mail, first-class postage prepaid, and addressed to David I. Bruck, Esquire, Post Office Box 11744, Columbia, South Carolina 29211, (803) 765-1044. He further certifies that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of May, 2001.

S. Creighton Waters

SWORN to before me this
7th day of May, 2001.

(LS)
Notary Public for South Carolina
My Commission Expires: 8-7-2010

ORIGINAL

GRANTED

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FILED
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IN THE

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October Term, 2000

No. 00-9280

WILLIAM ARTHUR KELLY,

PETITIONER.

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

On Writ of Writ of Certiorari to the Supreme Court of South Carolina

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REPLY BRIEF FOR PETITIONER

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8 pp

ARGUMENT IN REPLY

1. The state continues to insist that its emphasis on petitioner's purported future dangerousness in prison did not implicate the rule of Simmons v. South Carolina, 512 U.S. 154 (1994), because a capital murderer's in-prison dangerousness does not also tend to establish his dangerousness in general. Brief in Opposition (hereinafter BIO) at 14-17. Having already discussed this argument, Pet. for Cert. at 13-15, petitioner would add only that the prosecutor's jury argument contains no hint of this gossamer-thin distinction. At trial, the state offered its evidence of petitioner's potentially violent misconduct in jail for whatever significance the jury wished to give it. The prosecutor's jury argument did not suggest that this evidence proved only that petitioner would take hostages and use deadly weapons so long as he was incarcerated, but not afterwards. Although the prosecutor did cite petitioner's prison misconduct to refute the defense claim that he would adapt successfully to prison life, R. 2038-39, in the next breath he was implying that petitioner's behavior in pretrial confinement also demonstrated immutable character traits ("That's just shanks will be shanks. And murderers will be murderers. And he is the cold-blooded one right over there." R. 2040.). In short, the record does not

support the state's counter-intuitive reconstruction of its case at trial, which now seems to be that petitioner would be dangerous only so long as he was imprisoned.

2. Respondent alleges various procedural bars to consideration of some, though not all, of the state's future dangerousness evidence and argument at trial. BIO at 17-20, 23-24. The state also raised most of these procedural arguments in the South Carolina Supreme Court, State v. Kelly, Brief of Respondent at 30-32, 35, 37, but the state court addressed none of them and instead proceeded directly to the merits of petitioner's Simmons claim, holding that "future dangerousness was . . . neither a logical inference from the evidence nor was it injected into the case through the State's closing argument." State v. Kelly, 540 S.E.2d 851, 857 (S.C. 2001). The failure of the South Carolina Supreme Court to base any part of its decision on the procedural bars asserted by the state is not surprising, since the South Carolina courts have never held that a criminal defendant must itemize at trial every single fact in the record alleged to supporting a properly-preserved federal constitutional claim. The state's argument notwithstanding, there is no procedural impediment to this Court's consideration of the entire record in evaluating petitioner's Simmons claim.

3. The state attempts to differentiate this case from Simmons in part by asserting that in Simmons, "expert witnesses from the prosecution stated that Simmons posed a continuing risk to elderly women." BIO at 24. This is incorrect. In Simmons, the only expert witness to opine that Simmons was dangerous was a psychologist called by the defense. Having elicited this admission on cross-examination, the prosecutor then argued to the jury that even Simmons' "own psychologist, Dr. Evans, testified he is dangerous." Simmons v. South Carolina, No. 92-9059, J.A. at 102. In this case, the prosecutor's cross-examination of petitioner's psychologist yielded evidence that petitioner had a history of torturing animals, R. 1958-59, and of "obsessing" about killing people who made him angry. R. 1927. Whatever subtle distinctions may be drawn between these two sets of facts, no intelligible rule of federal constitutional law can apply to one but not the other.

4. Insisting on its right to prove petitioner's past dangerousness without implicating his future dangerousness, the state points out that evidence is often admitted for one purpose but not another. BIO at 27. However, the state overlooks that courts normally ensure the proper use of such evidence by means of limiting instructions. E.g. Dowling v.

United States, 493 U.S. 342, 353 (1990). Here a limiting instruction was requested and denied, and the record provides no reason to doubt that petitioner's jury interpreted the prosecution's evidence and argument as a generalized showing of future dangerousness.

5. The state implies that future dangerousness ought not to be deemed at issue, within the meaning of Simmons, unless the state offers its own expert testimony on the point, submits a formal dangerousness aggravating factor to the jury, or "pound[s] the podium" while telling the jury, "'You must put this person to death or he will kill somebody again in society in the future.'" BIO at 27. None of these examples are to be found in Simmons itself. Indeed, no South Carolina case will ever involve submission of a formal dangerousness aggravating factor, since South Carolina's capital sentencing statute does not include one. Respondent's depiction of "an express future dangerousness case to which the rule in Simmons was aimed" is actually a request to overrule Simmons by limiting it to what would be, in South Carolina at least, a non-existent set of cases.

Despite this Court's recent decision in Shafer v. South Carolina, 121 S.Ct. 1263 (2001), South Carolina's resistance to Simmons continues unabated. Indeed, on the day the present

petition for certiorari was filed, the prosecutor in this case was successfully resisting a Shafer-based motion for a new sentencing hearing in another case by quoting from his own jury argument in Kelly, and pointing to the South Carolina Supreme Court's determination that not even this argument had raised future dangerousness within the meaning of Simmons. State v. Haselden, No. 99-GS-32-3064 (Hearing on New Trial Motion, Lexington, S.C., April 5, 2001) (appeal pending S.C. Sup. Ct.). Unless corrected by this Court, the extremely narrow view of "future dangerousness" announced by the South Carolina Supreme Court in petitioner's case will likely prove as effective in nullifying the due process rule of Simmons for South Carolina capital defendants as was the misinterpretation of the Simmons "life without parole" requirement that the Court corrected in Shafer.

CONCLUSION

For the foregoing reasons and those contained in the petition for writ of certiorari, the writ should be granted.

Respectfully submitted,

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STATE OF SOUTH CAROLINA,

RESPONDENT,

PROOF OF SERVICE

The undersigned attorney hereby certifies that a manuscript copy of the Reply Brief for Petitioner was served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 9TH day of May, 2001, to:

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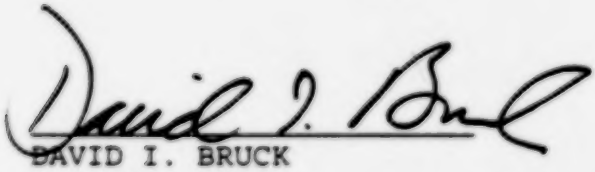

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May 9, 2001

No. 00-9280

In The

Supreme Court of the United States

WILLIAM ARTHUR KELLY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX
Volume I, Pages 1-155

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Certiorari Granted June 25, 2001

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 11, 1996	Petitioner indicted for murder, kidnaping, armed robbery, and possession or display of a knife during a crime of violence.
February 16, 1998	Petitioner arraigned in Lexington County Court of General Sessions.
September 14, 1998	Jury selection begins in Lexington County Court of General Sessions.
September 16, 1998	Trial begins.
September 17, 1998	Trial jury finds petitioner guilty as charged.
September 18, 1998	Penalty phase begins.
September 19, 1998	Sentencing jury returns death sentence, and court imposes death sentence on petitioner.
January 8, 2001	South Carolina Supreme Court affirms convictions and death sentence.
February 7, 2001	South Carolina Supreme Court grants stay of execution pending petition for writ of certiorari.
April 5, 2001	Petition for writ of certiorari filed.
June 25, 2001	Petition for writ of certiorari granted.

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR **COUNT ONE** – MURDER; **COUNT TWO** – KIDNAPPING; **COUNT THREE** – ARMED ROBBERY; and **COUNT FOUR** – POSSESSION OR DISPLAY OF A KNIFE DURING THE COMMISSION OF A VIOLENT CRIME
COUNTY OF LEXINGTON	)	

At a Court of General Sessions, convened on November 11, 1996, the Grand Jurors of Lexington County present upon their oath:

COUNT ONE – MURDER

That WILLIAM ARTHUR KELLY, did in Lexington County on or about January 5, 1996, willfully, feloniously and with malice aforethought kill one SHIRLEY S. SHEALY by means of stabbing, cutting and wounding the victim numerous times with a knife, and the said SHIRLEY S. SHEALY died in Lexington County on or about January 5, 1996, as a result of exsanguination due to incised wounds of the neck and multiple stab wounds to the back and chest.

COUNT TWO – KIDNAPPING

That **WILLIAM ARTHUR KELLY** did in Lexington County on or about January 5, 1996, unlawfully and feloniously seize, confine, inveigle, decoy, kidnap, abduct or carry away SHIRLEY S. SHEALY, in that WILLIAM ARTHUR KELLY did unlawfully deprive SHIRLEY S.

SHEALY of her freedom without authority of law and in violation of § 16-3-910 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ Donald Myers
SOLICITOR

COUNT THREE – ARMED ROBBERY

That **WILLIAM ARTHUR KELLY** did in Lexington County on or about January 5, 1996, while armed with a deadly weapon, to wit: a knife, unlawfully and feloniously take from the person or in the presence of SHIRLEY S. SHEALY by means of force or intimidation goods, monies or other personal items of the said SHIRLEY S. SHEALY and/or Kentucky Fried Chicken at 431 West Columbia Avenue in Batesburg-Leesville, such goods, monies or other personal items being described: Lawful U.S. coins and/or currency, or other personal property items, all in violation of § 16-11-330 of the South Carolina Code of Laws (1976), as amended.

COUNT FOUR – POSSESSION OR DISPLAY OF A KNIFE DURING THE COMMISSION OF A VIOLENT CRIME

That **WILLIAM ARTHUR KELLY** did in Lexington County on or about January 5, 1996, willfully and unlawfully have in his possession, or did visibly display, a knife during the commission of a violent crime or crimes, to wit: Murder and/or Armed Robbery, as

defined in § 16-1-60, all in violation of § 16-23-490 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

/s/ Donald V. Myers
SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
ELEVENTH JUDICIAL CIRCUIT

[Caption Omitted In Printing]

TRIAL TRANSCRIPT

OPENING STATEMENTS BY THE SOLICITOR

* * *

[1243] WE'LL NOW BEGIN THE TRIAL OF THE CASE. OPENING STATEMENTS, SOLICITOR.

THE SOLICITOR: MAY IT PLEASE THE COURT. MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY,

[1244] YOU HAVE BEEN INTRODUCED TO EVERYBODY. AND I'M GOING TO DO IT AGAIN BECAUSE YOU ARE GOING TO SEE THESE PEOPLE FOR THE NEXT FEW DAYS.

MY NAME IS DONNIE MYERS. I'M YOUR SOLICITOR AND SEATED AT COUNSEL TABLE HERE ASSISTING ME IS TOM CHASE AND FRAN HUMPHRIES. AND IN *THE STATE VERSUS WILLIAM ARTHUR KELLY*, WE REPRESENT THE STATE.

MR. KELLY OVER THERE IS REPRESENTED BY MS. BETH FULLWOOD, WES KIRKLAND, HERVERY YOUNG. AND THEY REPRESENT THE DEFENDANT.

AND YOU KNOW MONDAY WHEN I READ OUT THAT INDICTMENT AND WHEN JUDGE CLARY EXPLAINED IT TO YOU, I'M SURE SOMEONE IN THE COURTROOM SAID, DO WHAT? MURDER. ARMED

ROBBERY. KIDNAPPING. USE OF A KNIFE IN A VIOLENT CRIME. HOW COULD SOMEBODY DO THAT TO ANOTHER HUMAN BEING? YOU MAY HAVE THOUGHT THE DEFENDANT WAS ANOTHER LAWYER OVER THERE LOOKING AT HIM. HE DID IT. AND IT'S NOT GOING TO BE PRETTY. WITH HIS HANDS, HE MURDERED.

MURDER IS THE TAKING OF THE LIFE OF ANOTHER HUMAN BEING WITH MALICE AFORETHOUGHT. HE DID THAT.

ARMED ROBBERY. THAT'S STEALING BY PUTTING SOMEBODY IN FEAR WITH FORCE AND INTIMIDATION WITH A DEADLY WEAPON AND STEALING FROM THEM. HE DID THAT.

KIDNAPPING. UNLAWFULLY SEIZING, CONFINING, ABDUCTING ANOTHER HUMAN BEING WITH FORCE OR INTIMIDATION [1245] WITH ANY TYPE OF MEANS WITHOUT AUTHORIZATION UNDER THE LAW. HE DID THAT.

POSSESSION OF A KNIFE DURING A VIOLENT CRIME. ARMED ROBBERY AND MURDER ARE VIOLENT CRIMES. AND, FOLKS, HE HAD A KNIFE. YOU ARE GOING TO HEAR WHAT HE DID WITH THAT KNIFE. HE DID THAT. ALL TO A YOUNG WOMAN NAME [sic] SHIRLEY SHEALY ON FRIDAY, JANUARY THE 5TH, 1996, SHORTLY AFTER 10:30 P.M. AT THE KENTUCKY FRIED CHICKEN RESTAURANT IN BATESBURG, SOUTH CAROLINA, IN LEXINGTON COUNTY.

IF YOU WILL TAKE THE ROAD IN FRONT OF THE COURTHOUSE AND TAKE HIGHWAY ONE AND GO UP TO BATESBURG-LEESVILLE AND YOU GET UP THERE IN THAT AREA AND THE ROAD FORKS OFF, 23 GOES TO THE RIGHT AND HIGHWAY ONE GOES TO THE LEFT. GO ON DOWN THROUGH TOWN, YOU GO PAST SHEALY'S BARBECUE. EVERYBODY KNOWS WHERE SHEALY'S IS. I EAT THERE TOO MUCH MYSELF SOMETIMES. THEN YOU GO ON PAST THAT AND GET ON DOWN THERE IN BATESBURG AND THAT AREA, KENTUCKY FRIED CHICKEN IS ON THE RIGHT. YOU ARE GOING TO HEAR A LOT ABOUT THAT, FOLKS.

SHIRLEY WAS THE MANAGER THERE. HE [KELLY] HAD WORKED THERE IN 1995. HE KNEW ABOUT THE PLACE. HE KNEW THE ACTIVITIES. HE KNEW THE COURSE OR THE CONDUCT OF THE BUSINESS. HE QUIT IN DECEMBER OF '95. BUT FOR SOME REASON, HE CAME BACK ON FRIDAY, JANUARY THE 5TH OF 1996. HE STAYED AROUND THERE A GOOD BIT THAT AFTERNOON. SHIRLEY [1246] WAS WORKING; OTHER PEOPLE WERE WORKING. SOME OF HIS FORMER ASSOCIATES THAT HE WORKED WITH. HE LEFT ABOUT DARK AND HIS PLAN WAS ALREADY IN MOTION. SHIRLEY HAD LESS THAN A FEW HOURS TO LIVE BECAUSE HE KNEW WHAT HE WAS GOING TO DO. HE KNEW WHAT HE WAS GOING TO DO BECAUSE HE HAD SOMETHING IN HIS HEART CALLED LUST. LUST FOR THE ALMIGHTY GREENBACK DOLLAR. HE HAD MURDER ON HIS MIND AND LUST IN HIS HEART FOR THAT MONEY AND BE DAMN IF ANYBODY GETS IN HIS WAY.

SHIRLEY WAS HIS TARGET. YOU ARE GOING TO SEE A BUNCH OF EXHIBITS. YOU ARE GOING TO SEE A BUNCH OF DIAGRAMS. AND YOU ARE GOING TO HEAR WITNESSES TESTIFY ABOUT IT. YOU ARE GOING TO HEAR SOME PEOPLE TESTIFYING ABOUT THAT NIGHT, CLOSING UP. TWO LADIES THERE TO CLEAN UP. THEY CUT OUT THE LIGHTS ABOUT TEN AND THEN THEY HAVE TO CLEAN UP FOR AWHILE. TWO FOLKS WERE THE LAST TWO TO WALK OUT OF THE KENTUCKY FRIED CHICKEN, SHIRLEY SHEALY AND A LADY NAME MS. BARBARA ADAMS. THEY GO OUT AND GET IN THEIR CARS. SHIRLEY LEAVES FIRST. SHE COMES OUT OF THE KENTUCKY FRIED CHICKEN. YOU ARE GOING TO SEE THIS DIAGRAM. THIS IS IT RIGHT HERE (INDICATES). THIS IS THE KENTUCKY FRIED CHICKEN PLACE IN BATESBURG. SHEALY'S IS RIGHT THERE (INDICATES). LEXINGTON. DOWN HERE IS GOING DOWN TOWARDS AIKEN. YOU GO IN HERE, YOU COME AROUND.

WHEN THEY WENT OUT THAT NIGHT, SHIRLEY GOT IN HER CAR BACK HERE BY THIS GARBAGE DUMPSTER (INDICATES). MS. [1247] ADAMS GOT IN HER CAR HERE (INDICATES) SHIRLEY PULLED OUT TO TAKE A RIGHT TO GO DOWN TO THE STOPLIGHT WHERE SHE WOULD GO HOME. MS. ADAMS STAYED THERE FOR AWHILE FOR HER CAR TO WARM UP AND THEN SHE LEFT. LITTLE DID MS. ADAMS KNOW THAT WOULD BE THE LAST TIME SHE WOULD SEE HER FRIEND SHIRLEY SHEALY.

SHIRLEY GOES ON DOWN THE ROAD. HE STARTS HIS PLAN. HE ABDUCTS HER. HE WAS IN HER CAR. SHE DOESN'T KNOW IT. HE'S GOT A KNIFE. THEY

CALL IT A SKIN-DIVING KNIFE. IT'S AN UGLY LOOKING THING. IT'S SHARP. HE MAKES HER GO BACK TO THAT KENTUCKY FRIED CHICKEN. WHY? HE KNOWS THE MONEY IS IN THE SAFE. WHY HER? SHE KNOWS THE COMBINATION. AND WHY DOES HE TAKE HER BACK? LUST FOR THE GREENBACK DOLLAR.

HE MAKES HER PULL UP, STOPS THE CAR RIGHT HERE (INDICATES). THERE ARE TWO WAYS TO GET IN. YOU CAN GO IN THROUGH THE DOOR ON THIS SIDE, THE DOOR ON THE OTHER SIDE. HE MAKES HER GO INTO THE DOOR RIGHT THERE WHERE HER CAR IS. HER CAR IS STILL RUNNING. HER DOOR IS OPEN. WHEN HE GETS OUT THE BACK, HE KNOCKS OUT A PIECE OF PAPER THAT'S DOWN THERE ON THE GROUND. HE GOES INSIDE. HE MAKES HER OPEN THE SAFE FOR WHAT HE WANTS. OVER 13 HUNDRED DOLLARS IN THAT SAFE. SHE HAD PUT IT IN THERE SHORTLY BEFORE WHEN SHE MADE HER ACCOUNTING. SHE HAD EVEN WRITTEN OUT IN HER HAND SOME OF THE MONEY SHE HAD PUT IN THERE. YOU ARE GOING [1248] TO SEE THAT.

WHEN THE MONEY'S GOTTEN OUT OF THE SAFE, THEN HE TAPES HER HANDS BEHIND HER BACK WITH DUCT TAPE. HE TRIES TO TAPE HER TO A CHAIR. THERE IS SOME DUCT TAPE AROUND A CHAIR HE TRIED TO TAPE HER LEG TO AND THEN HE BEGINS TO WORK ON HER WITH HIS KNIFE.

HE'S STABBING HER ALL OVER THE PLACE. SHE'S ABLE TO GET LOOSE FROM THAT CHAIR. A

LITTLE SMALL OFFICE, NO BIGGER THAN THIS WITNESS BOX IN HERE WHERE THE SAFE IS DOWN IN THE FLOOR. IT'S JUST A HOLE IN THE FLOOR. THEY GO FROM AROUND THAT AREA, FIGHTING, SCUFFLING, RIGHT ON TO THE BACK OF THE STORE.

THERE'S BLOOD, FOLKS, EVERYWHERE. THAT SECOND PART IS WHERE HE FINISHES HER OFF. HE STABBED HER OVER THIRTY TIMES. HE SLIT HER THROAT FROM SIDE-TO-SIDE. HE CUT HER ON THE SIDE OF THE NECK. HE CUT HER FROM THE TOP OF HER HEAD DOWN TO HER BACK. HE CUT HER ON THE BACK. HE CUT HER IN HER NECK, CUT HER UNDER HER BREASTS, ON THE SIDE AND JUST RIPPED HER BACK FROM EVERYWHERE IMAGINABLE. THAT'S WHAT HE DID.

AND IN SCOOPING UP HIS LUST FOR MONEY AND HIS MONEY, HE WAS INTERRUPTED. HE WAS INTERRUPTED BY A POLICE OFFICER WHO JUST HAPPENED TO COME BY. HE SAW THE CAR, SAW THE CAR RUNNING, SAW THE DOOR OPEN AND HE SAID, NOW, WAIT A MINUTE, SOMETHING'S NOT RIGHT HERE. I GO IN THAT PLACE TO [1249] EAT AND THEY CLOSE THE LIGHTS AT TEN AND THE LIGHTS ARE ON INSIDE. SOMETHING IS NOT RIGHT.

SO THIS POLICE OFFICER GOES DOWN – AS HE PASSED THE PLACE, HE TURNS AROUND AND HE COMES BACK. NO OTHER CAR IS AROUND, BUT SHIRLEY'S. AND WHEN HE PULLS IN HERE, HE SEES SOMEBODY INSIDE, DUCKED DOWN. NEARLY CAUGHT HIM THERE. HE CAME THAT CLOSE.

THE OFFICER PULLS ON AROUND HERE TO WHERE SHIRLEY'S CAR IS AND WHEN HE DOES, THE DEFENDANT JUMPS OUT OF THIS DRIVE-IN WINDOW AND RUNS ACROSS THIS BACK FENCE AND GETS IN HIS CAR THAT HE HAS LEFT BACK THERE TO CARRY OUT HIS PLAN.

PLANNING, ARRANGING. GETS AWAY. AND THAT OFFICER GOES INSIDE AND HE SEES LITERALLY A BLOOD BATH. HE SEES SHIRLEY IN THE BACK FACE DOWN, BLOOD EVERYWHERE. MONEY ALL OVER THE FLOOR. AND HE CALLS FOR BACKUP BECAUSE HE'S SEEN SOMEONE IN THERE AND HE DOESN'T WANT TO GO IN WITH WHAT HE JUST SAW. HE'S ASKING FOR BACKUP. MORE OFFICERS COME. THE DEFENDANT IS ON HIS WAY WITH MONEY HE CARRIED OUT. NOT VERY MUCH. AND YOU WILL HEAR WHAT HE TOOK SHIRLEY SHEALY'S LIFE FOR.

THEY CALL IN SOME S.L.E.D. FOLKS TO PROCESS THE PLACE. THEY CALL IN THE BLOODHOUNDS AND THE BLOODHOUNDS PICK UP A TRAIL BACK OVER HERE OVER THE FENCE AND IT GOES BACK OUT TO A STREET BACK OVER HERE WHERE HE HAD HIS CAR [1250] PARKED TO MAKE HIS GETAWAY THAT HE HAD LEFT THERE.

SHIRLEY IS BUTCHERED. YOU WILL HERE THE PATHOLOGIST TALK ABOUT THE STAB WOUNDS, THE CUTS. IT'S MONEY ALL UNDER SHIRLEY. IT'S MONEY ALL OVER THE FLOOR. IT'S BLOOD EVERYWHERE. IT'S FOOTPRINTS. HIS. THEY PROCESS THE SCENE AND THEY CHECK AROUND.

THEY START TALKING WITH PEOPLE AND TRY TO FIND OUT WHO IN THE WORLD COULD HAVE DONE THIS TO SHIRLEY SHEALY. WHO COULD HAVE BUTCHERED HER LIKE THAT. AND THEY FIND OUT HE WAS AROUND THE STORE THAT DAY. HE'S MISSING. THEY DON'T FIND HIM FRIDAY NIGHT. THEY DON'T FIND HIM SATURDAY. THEY DON'T FIND HIM SUNDAY. AND THEN MONDAY AFTERNOON, THEY FIND OUT THAT HE IS MANY STATES AWAY IN LOWELL, MASSACHUSETTS, WHERE HIS SISTER LIVES. HE TAKES OFF FROM BATESBURG-LEESVILLE AND HE STARTS HIS RUNNING. HE'S ON THE RUN. I-20, 95, NORTH CAROLINA, VIRGINIA, RIGHT ON UP, PHILADELPHIA, NEW YORK, NEW JERSEY, LOWELL, MASSACHUSETTS.

THE CHIEF OF THE BATESBURG POLICE DEPARTMENT, CHIEF OSWALD, WHO IS SITTING RIGHT BACK THERE ON OUR BENCH, HE FINDS OUT FROM A RELATIVE WHO CALLS HIM. HE CALLS THE LOWELL MASSACHUSETTS POLICE DEPARTMENT AND WE HAVE SOME FINE OFFICERS HERE FROM LOWELL MASSACHUSETTS. THEY GO TO THAT RESIDENCE. WILLIAM A. KELLY IS THERE. THEY ASK HIM CAN THEY TALK WITH HIM. SURE. SAYS WE WANT TO TALK TO YOU [1251] ABOUT SOMETHING THAT HAPPENED IN BATESBURG, SOUTH CAROLINA. THOSE OFFICERS NEVER HEARD OF BATESBURG, SOUTH CAROLINA. THEY DON'T KNOW WHAT HAPPENED. THEY JUST GOT A CALL FROM THE CHIEF AND THEY WANT TO FIND OUT ABOUT SOMETHING AT A KENTUCKY FRIED CHICKEN PLACE. THEY ASK HIM AT FIRST, DO YOU KNOW ANYTHING ABOUT IT.

NO, NOT ME. I DON'T KNOW A THING. AND THEY SAID, WELL, THERE'S SOMETHING DOWN THERE HAPPENED TO A WOMAN, WE WANT TO KNOW IF YOU KNOW ANYTHING ABOUT IT BECAUSE THEY WOULD LIKE TO TALK WITH YOU.

THEY ADVISE HIM OF HIS LEGAL RIGHTS. YOU HAVE HEARD OF THE *MIRANDA* RIGHTS. THEY ADVISE HIM. THEY GIVE HIM THAT COURTESY. HE SAYS I KNOW MY RIGHTS AND, WELL, YEAH, I DID IT. AND THEY SAID, WILL YOU COME DOWN TO THE STATION WITH US AND PUT IT IN WRITING. SURE. THEY ADVISE HIM AGAIN OF HIS LEGAL RIGHTS.

IN WRITING, HE SAYS THEY ADVISED ME OF MY LEGAL RIGHTS. THEY TOLD ME I HAVE THE RIGHT TO A LAWYER AND I CAN BE QUIET AND NOT SAY ANYTHING. WHATEVER I SAY CAN BE USED AGAINST ME AND WHOLE LOT OF OTHER RIGHTS. HE GIVES UP THOSE RIGHTS. WAIVES THEM. HE TELLS THEM A STORY. SOME TRUTH, SOME LIES. HE'S STILL LYING, BUT HE ADMITS KILLING SHIRLEY. HE EVEN DESCRIBES THE KNIFE THAT HE USED. AND HE SAID I MUST HAVE LEFT IT THERE AND HE DID BECAUSE THE KNIFE WAS FOUND THERE AT THE PLACE HE LEFT THERE. HE EVEN TOLD THEM WHAT WAS WRITTEN ON THE HANDLE OF THAT KNIFE AND [1252] DESCRIBED IT TO THEM. HE EVEN TOLD THEM ABOUT TAPING UP SHIRLEY AND HE SAID I KEPT STABBING HER EVEN WHILE SHE WAS GASPING FOR BREATH. HE WAS TALKING ABOUT TYING HER HANDS BEHIND HER. AND HE TELLS SOME TRUTH IN THERE. HE TELLS SOME LIES IN THERE. HE SAYS, YES, SIR, I JUMPED OUT THAT

DRIVE-IN WINDOW, RAN AWAY. AND THEY SAID, WELL, CAN YOU PUT ALL OF THAT DOWN HERE AND SIGN YOUR NAME ON IT AND HE DOES AND YOU WILL SEE, WRITTEN OUT SEVERAL PAGES, SOME TRUTH, SOME LIES. AND YOU WILL HEAR THE EVIDENCE. YOU DECIDE WHAT THE TRUTH IS. THAT'S YOUR JOB.

AND THEN THEY TAKE SOME OF HIS CLOTHING AND YOU KNOW WHAT HE'S GOT IN HIS FRONT POCKET IN LOWELL, MASSACHUSETTS, STILL ON MONDAY. HE'S GOT 90 DOLLARS, FIFTY ONE'S AND TWO TWENTY'S. IT'S BLOODSTAINED. AND YOU KNOW WHOSE BLOOD IS STILL ON THAT MONEY IN HIS POCKET IN LOWELL, MASSACHUSETTS, ON MONDAY. SHIRLEY SHEALY'S. THERE'S A WHITE T-SHIRT HE'S GOT IN LOWELL, MASSACHUSETTS. YOU KNOW WHOSE BLOOD IS ON THAT WHITE T-SHIRT OF HIS? SHIRLEY SHEALY'S. HE'S GOT A PAIR OF BLACK PANTS AND YOU KNOW WHOSE BLOOD IS ON THOSE BLACK PANTS. SHIRLEY SHEALY'S. HE'S GOT A PAIR OF BLACK AND BROWN BOOTS. GUESS WHOSE BLOOD IS ON THOSE BLACK AND BROWN BOOTS. YOU'LL HEAR THEM TESTIFY TO IT.

HE'S GOT 90 DOLLARS WITH HIM UP THERE. HE HAD SPENT SOME ON THE WAY TO BUY NEW CLOTHES, TO BUY NEW SHOES.

[1253] SHIRLEY'S TAKEN FOR AN AUTOPSY. SHE WAS LYING FACE DOWN; AND IN THE BLOOD, CAKED TO HER CLOTHES IS 102 DOLLARS THAT SHE

HAD FALLEN ON, 102 DOLLARS. THAT'S WHAT HE DID. THAT'S WHAT WILLIAM KELLY DID.

POSSESSION OF A WEAPON IN THE COMMISSION OF A VIOLENT CRIME, YES, SIR, YES, MA'AM. THAT KNIFE. KIDNAPPING, YES, SIR. HE DEPRIVED HER OF HER FREEDOM, HE CONFINED HER, HE SEIZED HER WITHOUT ANY TYPE OF AUTHORITY OF THE LAW.

ARMED ROBBERY, CERTAINLY. HE'S STILL GOT THE BLOOD MONEY ON HIM. SAVES MONEY THAT'S BEEN TAKEN OUT.

AND MURDER, THE MOST HEINOUS CRIME KNOWN TO MANKIND. YES, SIR. HE BUTCHERED HER LIKE AN ANIMAL WHAT FOR –

MR. KIRKLAND: OBJECTION, YOUR HONOR. I THINK HE'S GETTING –

THE SOLICITOR: – FOR LUST –

MR. KIRKLAND: – INTO ARGUMENT.

THE COURT: JUST ONE MOMENT.

I'M SORRY, I DIDN'T UNDERSTAND YOU.

MR. KIRKLAND: I THINK HE'S GETTING INTO ARGUMENT. HE'S GONE BEYOND OPENING STATEMENTS.

THE COURT: ALL RIGHT.

SOLICITOR, IF YOU WOULD PLEASE MAKE AN OPENING STATEMENT.

[1254] THE SOLICITOR: YES, FOR WHAT – FOR WHAT HE VALUES MORE THAN COMMON

DECENCY, FOR WHAT HE VALUES MORE THAN THE FEELINGS OF OTHERS, FOR WHAT HE VALUES MORE THAN HUMAN LIFE, THE LUST FOR MONEY.

[1374] **TIMOTHY CROWLEY – DIRECT BY MR. CHASE**

* * *

A LOWELL, MASSACHUSETTS POLICE DEPARTMENT STATEMENT REPORT. JANUARY 8, 1996, AT 5:40 P.M. TELEPHONE NUMBER 803-657-5523.

QUESTION: WAS A *MIRANDA* CARD READ AND

SIGNED: YES.

MY NAME IS: KELLY, WILLIAM ARTHUR.

ADDRESS: 93 THORNTON ROAD, BATESBURG, SOUTH CAROLINA.

FATHER'S NAME: MICHAEL THOMAS KELLY.

[1375] MOTHER'S MAIDEN NAME: JULIA L. KELLY. MARRIED: NO.

DATE OF BIRTH 5-26-78.

SOCIAL SECURITY NUMBER: 248-53-9902. OCCUPATION: COOK.

AT: MCDONALD'S AIKEN, SOUTH CAROLINA.

I AM MAKING A VOLUNTARY STATEMENT TO OFFICERS SERGEANT BRENDAN DURKIN AND INSPECTOR TIM CROWLEY.

QUESTION: WHAT IS THE HIGHEST SCHOOL GRADE YOU ATTENDED?

ANSWER: NINTH.

QUESTION: ARE YOU PRESENTLY UNDER DOCTOR'S CARE?

ANSWER: NO.

QUESTION: ARE YOU TAKING ANY MEDICATION?

ANSWER: NO.

HAVE YOU BEEN DRINKING ALCOHOLIC BEVERAGES?

ANSWER: NO.

HAVE YOU RECENTLY USED ANY FORM OF CONTROLLED SUBSTANCES?

ANSWER IS NO.

SUMMARY: THE STATEMENT THAT I AM ABOUT TO GIVE WILL BE GIVEN OF MY OWN FREE WILL. NO ONE HAS THREATENED ME OR PROMISED ME ANYTHING TO GIVE THIS STATEMENT. I HAVE BEEN ADVISED OF MY RIGHTS BY SERGEANT DURKIN, WHO READ THE RIGHTS OUT LOUD TO ME FROM AN ORANGE CARD. I UNDERSTOOD [1376] THE RIGHTS THAT WERE READ TO ME. I SIGNED THE CARD WHICH I KNOW MEANS THAT I UNDERSTAND MY RIGHTS. AFTER I SIGNED THE CARD, THE POLICE ASKED ME IF I WAS WILLING TO TALK TO THEM ABOUT THE REASON THAT I DROVE FROM SOUTH CAROLINA TO MASSACHUSETTS. MY SISTER LIVES

IN LOWELL AND I HAD PLANNED TO DRIVE UP HERE TO VISIT HER, BUT I HAD A PROBLEM IN SOUTH CAROLINA THAT MADE ME DECIDE TO COME EARLIER THAN I HAD PLANNED.

LAST FRIDAY NIGHT, JANUARY 5, 1996, JUST AFTER 10:00 P.M., I STABBED SHIRLEY SHEALY INSIDE THE KENTUCKY FRIED CHICKEN RESTAURANT AND TOOK SOME OF THE RESTAURANT'S MONEY. AFTER DOING THIS, I WAS SCARED AND DIDN'T KNOW WHAT TO DO. I KNEW THAT I HAD TO GET OUT OF SOUTH CAROLINA BECAUSE I KNEW THAT THE POLICE WOULD BE LOOKING FOR ME. I DECIDED TO COME TO LOWELL, MASSACHUSETTS, AND WHILE I WAS DRIVING UP HERE, THINK OVER WHAT I HAD DONE AND WHAT I SHOULD DO.

I INTENDED TO GO BACK TO SOUTH CAROLINA AFTER AWHILE, BUT NOT RIGHT AWAY.

TONIGHT, WHEN THE DETECTIVES CAME TO MY SISTER'S HOUSE, I HAD A GOOD IDEA WHY THEY WERE THERE, BUT I DIDN'T KNOW WHAT TO SAY AND DIDN'T WANT TO GET MY SISTER ELIZABETH INVOLVED IN ANYTHING THAT SHE DIDN'T KNOW ANYTHING ABOUT. WHEN THE POLICE CAME INTO THE HOUSE, THEY TOOK ME INTO A ROOM SO THAT WE COULD TALK PRIVATELY. I WAS GLAD THAT THEY HAD DONE THIS – CORRECTION. I WAS GLAD [1377] THAT THEY HAD DONE THAT BECAUSE I DIDN'T WANT MY SISTER TO KNOW WHAT WE WOULD BE TALKING ABOUT.

THEY READ THE RIGHTS CARD TO ME AND I SIGNED IT BECAUSE I UNDERSTOOD THE RIGHTS.

AT FIRST, THE POLICE TOLD ME THAT THEY KNEW ABOUT THE PROBLEM THAT I HAD HAD AT HOME IN SOUTH CAROLINA AND I LIED AND I TOLD THEM THAT I DIDN'T HAVE A PROBLEM. I LIED BECAUSE I WAS AFRAID FOR MY SISTER AND DIDN'T WANT TO SAY TOO MUCH.

THEN I REALIZED THAT THE POLICE ALREADY KNEW WHAT I HAD DONE AND I JUST WANTED TO GET IT OVER WITH. THE POLICE TOLD ME THAT I COULD TELL MY SIDE OF THE STORY AND THEY WOULD TYPE IT DOWN AND LET ME READ IT TO MAKE SURE WHAT IT SAYS IS WHAT I SAID.

I LIVE IN BATESBURG, SOUTH CAROLINA, WITH MY MOM AND MY DAD. I WORK AT MCDONALD'S – AT A MCDONALD'S RESTAURANT IN AIKEN, SOUTH CAROLINA, WHICH IS OFF U.S. ONE. I HAVE WORKED THERE FOR FOUR TO SIX MONTHS. BEFORE I WORKED AT MCDONALD'S, I WORKED AT KENTUCKY FRIED CHICKEN AND AT BURGER KING.

WHEN I WENT TO WORK AT KENTUCKY FRIED CHICKEN, SHIRLEY SHEALY WAS THE MANAGER. SHE WAS A FRIEND OF MY SISTER. SHIRLEY SEEMS LIKE SHE IS ABOUT 25 TO 27-YEARS OLD. SHE IS MARRIED TO A GUY NAMED NEAL SHEALY. NEAL DOESN'T LIKE ME THOUGH. HE ACCUSED ME OF SLEEPING WITH SHIRLEY. I NEVER GOT INTO AN ARGUMENT WITH HIM THOUGH. I [1378] USED TO JUST IGNORE HIM. HE WOULD EITHER SAY SOMETHING TO ME OR SAY IT TO SHIRLEY.

I WORKED AT K.F.C. MORE THAN EIGHT TO TEN MONTHS AND QUIT BECAUSE OF SHIRLEY. WHILE I

WORKED THERE, SHIRLEY WAS ALWAYS ASKING ME TO STAY WITH HER, SAYING THINGS LIKE SHE WANTED ME TO SLEEP WITH HER AND SHE WOULD COME UP TO ME AND FONDLE ME – MY WHOLE BODY SAYING THAT SHE WANTED TO HAVE SEX WITH ME. SHE ACTUALLY WOULD GRAB ME BY THE BALLS AND SAY THAT SHE WANTED ME BECAUSE – CORRECTION. GRAB ME BY THE BALLS AND SAY THAT SHE WANTED ME, BUT BECAUSE SHE WAS UGLY AND UNATTRACTIVE AND SEEMED DIRTY AND SMELLED, I WAS NEVER INTERESTED. I WOULD ALWAYS TELL HER TO LEAVE ME ALONE. SHIRLEY WOULD GET MAD AT ME BECAUSE I WOULDN'T SLEEP WITH HER AND BECAUSE OF THIS, SHE WOULD MAKE ME DO JOBS THAT ORDINARILY I WOULDN'T HAVE TO DO LIKE CLEAN THE LOBBY AND OTHER THINGS. EVERY ONCE IN A WHILE, I WOULD PLAY ALONG WITH HER AND ACT LIKE I WAS INTERESTED AND THEN TURN AWAY JUST TO MAKE HER MAD.

BECAUSE I WAS SICK OF DEALING WITH HER, I QUIT THE JOB. AFTER I QUIT, SHIRLEY CALLED ME A FEW TIMES AND ASKED ME HOW I WAS DOING. SHE WOULD STILL COME ON TO ME SEXUALLY. AT NO TIME DID I EVER HAVE PHYSICAL CONTACT WITH HER.

I HAVE NOT WORKED AT KENTUCKY FRIED CHICKEN FOR THREE OR FOUR MONTHS, BUT WHILE I WAS THERE, I DID KNOW [1379] THAT SHIRLEY WAS PREGNANT. HER HUSBAND HAD ACCUSED ME OF BEING THE FATHER, BUT LIKE I SAID, I'VE NEVER HAD SEX WITH HER.

I'VE BEEN ASKED TO DESCRIBE IN MY OWN WORDS WHAT HAPPENED INSIDE THE KENTUCKY FRIED CHICKEN LAST FRIDAY NIGHT AND I AGREED TO DO THIS.

LAST THURSDAY NIGHT, JANUARY 4, '96, I WAS AT HOME AND GOT A PHONE CALL FROM PATISHA DOZIER WHO I WORKED WITH AT K.F.C. SHE ASKED ME TO COME BY AND SEE HER BECAUSE I DIDN'T – I HADN'T BEEN THERE SINCE I QUIT K.F.C. I TOLD PATISHA THAT I WOULD STOP BY THE NEXT DAY.

ON FRIDAY, JANUARY 5TH, '96, AT AROUND 4:00 P.M., I STOPPED BY K.F.C. I WENT INSIDE AND VISITED WITH THE GIRLS WHO WORKED THERE, SHIRLEY, MARY ANN, BARBARA AND MARY. PATISHA WAS LATE SO I WAITED AROUND FOR HER TO SHOW UP. WHILE I WAS WAITING, SHIRLEY ASKED ME FOR A RIDE TO THE BANK. I DROVE HER TO HER BANK, NEWBERRY FEDERAL SO THAT SHE COULD MAKE A PERSONAL DEPOSIT, $400 IN THE DRIVE-THRU WINDOW INTO THE NATIONSBANK TO MAKE THE K.F.C. DEPOSIT. WE WENT TO THE NATIONSBANK WITH THE K.F.C. DEPOSIT FIRST.

WE RETURNED TO K.F.C. AND HUNG AROUND INSIDE WITH THE GIRLS UNTIL ABOUT 6:00 TO 7:00 P.M. I THEN WENT HOME AND STAYED THERE UNTIL 9:00, 9:30 P.M. I TOOK A SHOWER AND GOT DRESSED AND PLANNED TO GO TO THE ZOO, WHICH IS A TEEN [1380] CLUB IN COLUMBIA, SOUTH CAROLINA. I LEFT THE HOUSE DRIVING MY FOUR-DOOR MERCURY LYNX, COLOR GRAYISH SILVER,

BUT WHEN I LEFT, I DECIDED TO TAKE A DETOUR AND STOP BY K.F.C. TO SAY HEY, TO THE GIRLS.

WHEN I GOT BACK TO K.F.C., IT WAS AFTER 10:00 P.M., WHICH IS CLOSING TIME. I COULD SEE THAT THE LIGHTS WERE OUT LIKE THEY WERE CLOSED. I COULD SEE SHIRLEY'S CAR PARKED OUTSIDE IN THE FRONT OF THE LOT TO THE LEFT SIDE OF THE BUILDING FACING U.S. ~~ONE~~. I KNEW IT WAS HER CAR BECAUSE IT WAS RED-BROWN BURGUNDY COLORED FOUR-DOOR BIG CAR. THE CAR WAS RUNNING AND THE DRIVER'S DOOR WAS OPEN. I COULD SEE WHEN I PULLED UP THERE WAS NO ONE INSIDE THE CAR. I PARKED NEAR THE ENTRANCE AND GOT OUT OF THE CAR AND COULD SEE INTO THE RESTAURANT, BUT I COULDN'T SEE ANYONE INSIDE. THE DOOR NEAR WHERE SHIRLEY'S CAR WAS PARKED WAS OPEN. I OPENED THE DOOR AND WENT INSIDE. I WENT INTO THE EMPLOYEE DOOR AND SAW SHIRLEY IN THE OFFICE. I SAID HEY, SHIRLEY, AND SHE TURNED TOWARD ME. SHE WAS IN THE ROOM THAT THEY CALL THE OFFICE WHERE THE SAFE WAS. I SAW THAT THE SAFE WAS OPEN. SHE LOOKED LIKE SHE WAS GETTING READY TO LEAVE.

I ASKED SHIRLEY IF EVERYONE ELSE HAD LEFT AND SHE SAID YES, THAT MARY ANN HAD JUST LEFT A FEW MINUTES AGO. I SAID SEE YOU LATER, BUT THEN SHIRLEY ASKED ME TO STAY THERE AND TALK TO HER FOR AWHILE. SHIRLEY STARTED COMING ON TO [1381] ME LIKE I DESCRIBED BEFORE. SHE ASKED ME TO STAY AND HAVE SEX WITH HER AND TOLD ME THAT SINCE SHE WAS PREGNANT

ALREADY, IF WE HAD SEX, I COULDN'T GET HER PREGNANT. I DIDN'T WANT TO DO IT BECAUSE I DIDN'T LIKE HER AND WANTED TO LEAVE AND GO TO THE ZOO.

I STARTED TO LEAVE, BUT SHIRLEY GRABBED ME AND ASKED ME NOT TO LEAVE AGAIN. I PUSHED HER AWAY AND TOLD HER NOT TO PUT HER HANDS ON ME AND TOLD HER TO SIT IN THE CHAIR AND I WOULD STAY AND TALK WITH HER IF SHE DIDN'T TOUCH ME. SHIRLEY SAT IN THE CHAIR AND I SAW SOME WIDE DUCT TAPE, SILVER GRAY, THAT WAS ON THE FLOOR NEXT TO A FILE CABINET. I PICKED UP THE TAPE AND TOLD HER TO PUT HER HANDS BEHIND HER BACK. SHIRLEY LET ME DO THIS. I TAPED HER HANDS BEHIND HER BACK AS SHE SAT ON THE CHAIR. I SAID, THIS WAY YOU WON'T BE TOUCHING ME. I TOLD HER THAT IF SHE DIDN'T LET ME DO THIS, I WOULDN'T STAY AND LET HER TALK TO ME.

I LEFT HER TIED UP IN THE CHAIR ABOUT FIVE OR TEN MINUTES WHILE SHE WAS TELLING ME HOW MUCH SHE WANTED ME AND HOW MUCH SHE WANTED TO BE WITH ME. SHE TOLD ME THAT I MADE HER LIFE SPARKLE. I TOLD HER THAT I DIDN'T LIKE HER BECAUSE SHE WAS NASTY AND SHE GOT MAD AND STARTED TO POUT.

WHILE ALL THIS WAS GOING ON, I HAD A KNIFE ON ME THAT HAD A YELLOW HANDLE AND SAID "SEA STYLE" ON THE HANDLE THAT WAS LIKE A DIVING KNIFE. IT HAD A CUTTING BLADE ON [1382] ONE SIDE AND A JAGGED EDGE ON THE ONE SIDE. I

HAD BEEN CARRYING THIS KNIFE OFF AND ON FOR PROTECTION DURING THE PAST TWO WEEKS AFTER A BLACK GUY, WHO DIDN'T LIKE ME, THREATENED TO SHOOT ME. THE KNIFE WAS IN MY RIGHT PANTS POCKET WITH A PIECE OF PAPER WRAPPED AROUND THE BLADE. I WAS GOING TO LEAVE BECAUSE SHIRLEY HAD PISSED ME OFF. I WAS GOING TO LEAVE HER TIED UP LIKE THAT JUST TO MAKE HER MAD.

AS I TURNED TO LEAVE, SHIRLEY GOT UP AND FREED ONE HAND AND GRABBED ME AND I TOLD – AND TOLD ME TO COME BACK. I SAID, GET THE HELL AWAY FROM ME YOU SICK BITCH. I ALSO SAID OTHER THINGS LIKE CALLING HER A BITCH AND A SLUT.

I KEPT WALKING AND SHE KEPT TRYING TO PULL ME BACK INTO THE OFFICE AND STARTED HITTING ME ASKING ME NOT TO LEAVE. BOTH HER HANDS WERE FREE NOW, BUT ONE OF THEM, THE LEFT STILL HAD TAPE ON IT. I TOOK THE KNIFE OUT OF MY PANTS, TOOK THE PAPER OFF THE BLADE AND TURNED TO MY RIGHT AND SLIT HER THROAT. EVEN AFTER I CUT HER, SHE KEPT GRABBING AT ME SO I KEPT STABBING HER WHEREVER I COULD UNTIL SHE LET GO OF ME. I COULDN'T STOP MYSELF. I KEPT DRAGGING HER AS SHE HUNG ONTO ME AND KEPT STABBING HER UNTIL WE REACHED THE EMPLOYEES DOOR. SHIRLEY THEN LET GO AND FELL TO THE FLOOR. SHE WAS GASPING FOR AIR. I DON'T REMEMBER WHAT I DID WITH THE KNIFE. IT'S PROBABLY STILL THERE. I DIDN'T HAVE IT ON ME WHEN I LEFT K.F.C. WHILE [1383]

SHE WAS GASPING FOR AIR, LIKE I DESCRIBED, I WANTED TO KEEP HER FROM GETTING UP, SO I TAPED HER HANDS BEHIND HER BACK AGAIN. ALL THE TIME I WAS TAPING HER HANDS, SHE WAS GASPING FOR AIR. I STABBED HER AS MANY TIMES AS I HAD TO. I DON'T KNOW HOW MANY TIMES, BUT IT SEEMED LIKE IT WAS MORE THAN TWENTY TIMES.

ONCE SHIRLEY WAS TAKEN CARE OF AND PREVENTED FROM GETTING UP, I WAS CONFUSED AND GOING IN CIRCLES BECAUSE I KNEW THAT IF THE POLICE GOT THERE, I WOULD HAVE A CHANCE TO TELL MY STORY LIKE I AM NOW. THEY WOULD PROBABLY JUST SEE SHIRLEY THERE ALL TIED UP AND STABBED TWENTY TIMES AND GET ALL EXCITED AND TAKE ME UP.

I THEN WENT BACK TO THE SAFE BECAUSE I KNEW THAT I NEEDED – THAT I'D NEED MONEY TO GET AWAY AND TOOK THE MONEY THAT I COULD SEE. AS I WAS LEAVING, I DROPPED SOME OF THE MONEY THAT I TOOK ONTO THE FLOOR.

I THEN RINSED MY HANDS OFF IN THE SINK BECAUSE THERE WAS BLOOD ON THEM AND I THINK I LEFT THE KNIFE THERE, TOO. BECAUSE THERE WAS SO MUCH BLOOD ON THE FLOOR, I COULDN'T GET OUT THE DOOR. I CLIMBED OUT OF THE DRIVE-THRU WINDOW AND WENT TO MY CAR WITH THE MONEY UNDER MY COAT. I LEFT THE LOT AND HEADED TOWARD LEXINGTON, SOUTH CAROLINA.

IT WAS DURING THIS RIDE THAT I DECIDED TO LEAVE SOUTH CAROLINA AND HEAD TO MASSACHUSETTS TO VISIT MY SISTER.

[1384] AT AROUND MIDNIGHT, I LEFT LEXINGTON AND HEADED NORTH. I WAS STILL WEARING THE CLOTHES THAT I WAS WEARING WHEN I STABBED SHIRLEY. I WAS WEARING BLACK JEANS, BROWN AND BLACK BOOTS, BLACK SUEDE LEATHER JACKET WITH A CAMEL CIGARETTE LOGO, WHITE T-SHIRT AND PLAID YELLOW-BROWN BOXER TYPE UNDERWEAR.

ON THE WAY NORTH, I STOPPED AND BOUGHT CLOTHES WITH THE MONEY THAT I STOLE, BUT THE CLOTHES THAT I WAS WEARING WHEN I STABBED SHIRLEY IS STILL IN THE CAR INSIDE A PLASTIC BAG, COLOR YELLOW.

ON THE WAY NORTH, I SPENT ABOUT FOUR-HUNDRED DOLLARS ON CLOTHES, GAS, FOOD AND THINGS THAT I NEEDED, INCLUDING A WATCH AND SNEAKERS. I SLEPT IN THE CAR AND DROVE HERE AND ARRIVED IN LOWELL AT ABOUT 3:00 A.M. I SLEPT IN MY CAR IN A REST AREA AND GOT TO MY SISTER'S HOUSE ABOUT THIRTY MINUTES BEFORE THE POLICE CAME THERE.

FROM THE TIME ALL OF THIS HAPPENED, I HAVE NOT TOLD ANYONE WHAT I DID. MY SISTER AND NIECE JUST THINK I CAME FOR A SURPRISE VISIT. I NOW HAVE $141.55 LEFT. I HAD ABOUT FORTY DOLLARS ON ME WHEN I WENT INTO THE K.F.C. EVERYTHING ELSE THAT WAS IN MY POCKETS

WHEN THE POLICE TOOK ME WITH THEM WAS FROM K.F.C.

SERGEANT DURKIN HAD READ THE TYPED STATEMENT, WHICH I GAVE OUT LOUD TO ME WITH INSPECTOR CROWLEY IN THE ROOM AS I FOLLOWED ALONG. WHAT HE READ AND I READ IS WHAT [1385] I SAID AND IS THE TRUTH.

[1443] **STEVEN M. DERRICK – DIRECT BY MR. HUMPHRIES**

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Q WHAT I WANT TO DO, AGENT DERRICK, IS TO GO BACK TO THAT FIRST AREA OF CONFLICT. BASED ON YOUR EXAMINATION AND [1444] IN YOUR EXPERT OPINION, CAN YOU TELL THIS JURY HOW MANY BLOWS, AT THE VERY LEAST, WAS STRUCK IN THAT AREA AND WHERE THEY MIGHT HAVE OCCURRED RELATING TO WHETHER THE VICTIM WAS SEATED IN THE CHAIR OR NOT?

A OKAY. IN EXAMINATION OF THE BLOODSTAINS IN THIS PARTICULAR AREA, THERE HAD TO BE AT A MINIMUM OF FOUR BLOWS.

FIRST OFF, THERE HAD TO BE A STAB OR A BLOW TO CREATE A WOUND TO CAUSE THE BLOOD TO COME TO THE SURFACE. WITHOUT BLOOD BEING ON THE SURFACE, THESE SPATTER IMPACTS THAT I LOOK FOR WOULD NOT BE PRESENT. SO THERE IS

AT LEAST ONE WOUND TO CREATE THE BLOODLETTING.

ONCE BLOODLETTING HAS OCCURRED, ADDITIONAL IMPACT INTO THE AREA WHERE THE BLOOD IS PRESENT WILL CREATE TEAR DROPS OF BLOOD THAT ARE PROJECTED OUT AS THE FORCE IS APPLIED TO IT.

IN EXAMINING THE CHAIR, THERE WERE TWO AREAS OF IMPACT SPATTER. ONE BEING ON THE FRONT SIDE OF THE BACK TOP OF THIS BACK RAIL, THE SIDE THAT A PERSON WOULD BE SITTING ON. THESE IMPACT SPATTERS HAD PROJECTED OUT.

WHEN STUDYING THESE SPATTER PATTERNS, AS THEY GO OUT IN VARIOUS LOCATIONS, THEY POINT BACK TO THE AREA THAT THEY COME FROM. WHEN THERE IS A CONSIDERABLE NUMBER OF THESE IMPACT SPATTERS THAT ARE PRESENT AND STUDYING THEM AND ORIENTING THEM BACK TO THE DIRECTION THEY CAME FROM, [1445] WHEN THESE TEAR DROP SPATTERS CROSS, IT'S REFERRED TO AS A POINT OF CONVERGENCE. USING ALL OF THESE, WHERE THEY MEET AND CROSS, IS THE APPROXIMATE GENERAL AREA OF WHERE THIS SOURCE OF BLOOD CAME FROM WHEN FORCE WAS APPLIED TO IT.

THERE WAS ONE OF THOSE AREAS THAT WAS ON THE FRONT SIDE UPPER RAIL OF THE BACK OF THIS CHAIR. ON THE OTHER SIDE OF THE CHAIR, THERE WAS A CONSIDERABLE NUMBER OF THESE

SPATTERS WHICH CAME UP TO A POINT OF CONVERGENCE JUST ABOVE THE TOP RAIL OF THE CHAIR. THIS BEING ON THE BACK SIDE.

ON THE FLOOR AND ALSO IN OTHER AREAS OF THE CHAIR, THERE WAS A CONSIDERABLE NUMBER OF CRISSCROSSING SPATTERS. THEY ALL CONVERGE PRIMARILY IN THE AREA RIGHT NEXT TO THE CHAIR WHERE THERE WAS A POOL OF BLOOD. BECAUSE THERE WERE SO MANY THAT WERE CROSSING SO CLOSE TOGETHER, I CANNOT SPECIFICALLY ACCOUNT FOR A NUMBER OF BLOWS IN THAT PARTICULAR AREA, BUT I CAN SAY THAT THERE IS AT LEAST A MINIMUM OF ONE AND PROBABLY MORE IN THAT PARTICULAR AREA.

Q IS IT YOUR TESTIMONY THEN THAT THE VICTIM WOULD HAVE HAD TO BEEN SEATED IN THAT CHAIR FOR AT LEAST ONE BLOW?

A BASED ON THE EVIDENCE I SAW, THAT WOULD BE CORRECT.

Q OKAY. NOW, LET'S GO TO THE FINAL AREA OF ASSAULT OR CONFLICT, IF YOU WILL, AND TELL THE JURY WHERE IS THE MAJOR BLOODLETTING OCCURRING?

A IN THIS AREA OVER HERE AROUND THE DOORWAY AND INTO [1446] THE BATHROOMS THERE IS A NUMBER OF IMPACT SPATTERS THAT HAVE POINTS OF CONVERGENCE.

STARTING OUT HERE ON THIS WALL, THERE ARE SOME IMPACT SPATTERS THAT ARE PRESENT THAT HAS POINT OF CONVERGENCE ON THIS WALL

HERE. WHICH MEANS THAT THE SOURCE OF THE BLOODLETTING IS VERY CLOSE TO THE WALL AND OUT FRONT. ASSOCIATED WITH THE SPATTERS IN THIS AREA HERE ARE SOME SWIPE MARKS OR TRANSFER MARKS AND, WHAT I MEAN BY THAT IS, IF I HAVE BLOOD ON MY CLOTHING OR ON MY SKIN AND I BRUSH AGAINST THIS WOOD, THEN THE BLOOD THAT'S ON MY CLOTHING OR ON MY SKIN THAT IS STILL WET WILL TRANSFER FROM THIS CLOTHING TO THAT PARTICULAR SURFACE.

IF I AM MOVING WHILE I MAKE CONTACT WITH IT, IT WILL GIVE KIND OF A SWIPING OR MOVEMENT MARK. ASSOCIATE WITH THE SPATTER WAS THE SWIPING PATTERN ON THIS WALL AND I'M NOT VERY GOOD WITH THE LASER POINTER AND RIGHT HERE IN THIS LITTLE CORNER AREA OF THE WALL.

MOVING FROM THERE TOWARD THE DOOR, I PICKED UP APPROXIMATELY THREE AREAS, THREE DIFFERENT SOURCES OF THIS IMPACT SPATTER THAT'S HIGH UP ON THIS SIDE OF THE DOOR TO INDICATE THREE AREAS OF CONTACT.

NOW, ASSOCIATED WITH THIS IS SOME BLOODSTAINS THAT ARE BACK ON THIS WALL OVER HERE. THOSE ARE REFERRED TO AS CAST-OFF STAINS. IN SIMPLE EXPLANATION OF THIS, IF I WAS TO TAKE A KNIFE AND TO STAB MYSELF IN THE HAND, AS I [1447] WITHDRAW THE KNIFE, BLOOD WILL COME FROM MY HAND ONTO THE BLADE OF THE KNIFE. AS I PUT THE KNIFE IN MOTION, THIS LOOSE BLOOD THAT IS ON THE KNIFE OR COULD POSSIBLY BE ON MY HAND BEGINS TO COME OFF BECAUSE THE

MOTION IS APPLIED TO THE OBJECT THAT IT'S ON. SO THE BLOOD WILL COME OFF IN THIS DIRECTION. IT COULD COME OFF STRAIGHT UP. AND WHEN I COME TO A SUDDEN STOP, THIS LOOSE BLOOD WILL FLY OFF DIRECTIONALLY POINTING BACK TO THE AREA FROM WHICH IT CAME FROM.

THE DIFFERENCE BETWEEN THIS TYPE OF BLOODSTAIN AND THAT OF THE IMPACT SPATTER ARE THAT THESE STAINS ARE LARGER BECAUSE THERE'S NOT ENOUGH FORCE APPLIED TO THEM THEY STAY VIRTUALLY IN A STRAIGHT LINE. EVEN THOUGH THEY CAN BE SCATTERED OUT, THEY ARE ALL POINTING BACK IN THE SAME DIRECTION. THEY DON'T HAVE A POINT OF CONVERGENCE AS I SPOKE OF EARLIER WITH THE IMPACT SPATTER.

SO ASSOCIATED WITH THE STAINS ON THE DOOR, THERE ARE AT LEAST TWO CAST-OFF PATTERNS REPRESENTED ON THIS WALL.

I ALSO NOTED ON THIS DOOR FOR THE FIRST TIME IS BLOODSTAINS THAT WERE TOWARD THE BASE OF THE DOOR THAT ARE ASSOCIATED WITH AN ARTERY BEING CUT AND THUS SPURTING BLOOD. THESE TYPE STAINS ARE REFERRED TO AS ARTERIAL SPURTS; AND WHAT IT IS, IS WHEN AN ARTERY IS OPENED, AS THE HEART PUMPS THE BLOOD BECAUSE THERE IS AN OPENING IN THAT [1448] ARTERY, THE BLOOD IS PUMPED OUT. THERE ARE LARGE DROPS OF BLOOD AND YOU USUALLY HAVE LITTLE STREAMS BEHIND THEM THAT MAKE THEM UNIQUE AND SPECIFIC TO THEMSELVES. THOSE WERE FIRST OBSERVED AT THE BASE OF THIS

DOOR AND OVER HERE ON THIS DOORFRAME ALSO.

ALONG WITH THOSE PARTICULAR SPURTS, AGAIN, THERE WAS A SWIPE OR A TRANSFER THAT WENT THROUGH THESE STAINS AND THE STREAK MARKS WERE READILY VISIBLE.

THERE WAS ANOTHER AREA WITH POINTS OF CONVERGENCE OF IMPACT SPATTER OVER HERE ON THIS WALL NEXT TO THE FIRE EXTINGUISHER.

BASED ON THE NUMBER OF SPATTERS OF CRISS-CROSSING PATTERNS THERE, AGAIN IT'S LIKE THIS POOL OF BLOOD WHERE THE CHAIR IS, I CAN SAY THAT THERE IS AT LEAST A MINIMUM OF ONE IMPACT OUT FROM THAT WALL AND PROBABLY MORE.

Q NOW, LET ME ASK YOU THIS, REGARDING THE LOCATION - THE FINAL LOCATION OF THE VICTIM'S BODY, WHICH YOU HAVE INDICATED IS HERE, YOU HAVE ALSO TESTIFIED THAT THERE WAS BLOOD EVIDENCE OR BLOOD SPATTER EVIDENCE IN THIS AREA (INDICATES)?

A YES, SIR.

Q WOULD THE VICTIM HAVE HAD TO REACH THIS AREA AT LEAST AT SOME POINT IN TIME DURING THE BLOODLETTING?

A YES, SIR -

Q AND -

[1449] A - IT WOULD HAVE HAD TO BEEN IN THE HALLWAY -

Q - AND DO YOU HAVE, BASED ON YOUR EXPERT OPINION, DO YOU KNOW HOW OR WHY THE VICTIM ENDED UP IN THIS POSITION? WAS THERE ANY EVIDENCE RELATED TO THE BLOOD THAT WOULD INDICATE TO YOU HOW SHE ARRIVED AT HER FINAL POSITION HERE?

A OKAY. ALONG WITH THE SPATTER, WHICH I SPOKE OF ON THE WALL, ON THE FLOOR BETWEEN THIS LITTLE DRAIN PLUG AND THE DOOR WAY, THERE WAS A CONSIDERABLE POOL OF BLOOD. THIS POOL OF BLOOD WAS LARGE IN AREA. SO THEREFORE THE LITTLE DROPS THAT I'D BE LOOKING FOR ON THE FLOOR ARE OBVIOUSLY COVERED BY THIS POOL OF BLOOD. BUT FROM THIS POOL OF BLOOD BACK TO THE VICTIM'S LOCATION, THERE ARE STREAK MARKS IN THIS BLOOD, STARTING ROUGHLY RIGHT IN HERE (INDICATES). YOU'VE GOT A LARGE POOL OF BLOOD AND THEN YOU HAVE THE STREAKING MARKS THAT COME FROM THIS HALLWAY AREA BACK TO THE FINAL LOCATION OF THE VICTIM.

Q IN LAYMAN'S TERMS, SHE WAS DRUG TO THAT POSITION?

A IT WOULD BE CONSISTENT WITH THE VICTIM HAVING BEEN DRUG FROM THIS AREA TO THIS AREA (INDICATES).

[1560] **DR. JOEL S. SEXTON – DIRECT**
BY MR. HUMPHRIES

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MR. HUMPHRIES: DOCTOR, WHAT I'M GOING TO ASK YOU TO DO IS TO TALK ABOUT YOUR RELEVANT FINDINGS RELATED TO THE AUTOPSY AND YOU TELL ME, SHOULD WE START FRONT, TOP OR BACK?

THE WITNESS: FRONT.

Q REFERRING TO STATE'S 62.

I'M GOING TO HAND YOU A LASER POINTER. PERHAPS, THAT WILL BE OF SOME ASSISTANCE TO YOU.

A AS YOU CAN SEE, THIS IS A DIAGRAM SHOWING THE FRONT OF THE BODY AND THE BACK OF THE BODY. THE AREAS IN ORANGE ARE SHARP INCISED OR STAB WOUNDS. NOTICE HERE ON THE FRONT OF THE BODY, ON THE RIGHT SIDE, THERE ARE FOUR THAT ARE SITUATED HERE, DOWN THE RIGHT SIDE OF THE CHEST (INDICATES).

NOW, THE LIVER COMES UP INSIDE THIS AREA. SO THREE OF THESE ACTUALLY – I'M SORRY, TWO OF THESE IN THIS AREA AND THIS ONE WENT INTO THE LIVER, WHEREAS THIS ONE WENT INTO THE ABDOMINAL CAVITY AND THIS ONE UP HERE ON THE RIGHT CHEST A LITTLE HIGHER WENT INTO THE RIGHT LUNG. SO THERE WERE TWO STAB WOUNDS OF THE RIGHT LUNG FROM THE FRONT. I'M SORRY, ONE STAB WOUND FROM THE RIGHT

LUNG FROM THE FRONT, THREE IN THE LIVER AND ONE IN THE ABDOMINAL CAVITY.

[1561] IF YOU NOTICE HIGH ON THE NECK AND I'LL SHOW YOU A BLOWUP OF THAT IN A MOMENT, THERE ARE SOME INCISED WOUNDS. AND THE DIFFERENCE BETWEEN INCISED AND STABBED, STAB IS WHEN THE POINT OF THE BLADE ENTERS THE BODY AND PRODUCES A WOUND THAT'S DEEPER THAN IT IS LONG ON THE SURFACE OF THE BODY.

AN INCISED WOUND IS WHERE THE SHARP EDGE IS DRAWN ACROSS THE SURFACE OF THE BODY, PRODUCES A VERY LONG WOUND THAT MAY BE SHALLOW.

SO THERE WERE FIVE STAB WOUNDS HERE ON THE FRONT OF THE RIGHT CHEST.

LOOKING AT THE BACK OF THE BODY, THERE'S A CHOPPING TYPE OF WOUND IN MY OPINION, ALTHOUGH, IT COULD ALSO BE AN INCISED WOUND HERE ON THE BACK OF THE HEAD THAT'S THREE INCHES LONG. IT HAS A ONE-INCH CUT IN THE BONE AND THAT'S WHY I FEEL LIKE IT'S CHOPPING. THAT ONE-INCH CUT IS IN THE CENTER OF THE WOUND AND IT'S MORE CONSISTENT WITH THE KNIFE BLADE HITTING IT LIKE AN AX SO AS TO CAUSE THIS LINEAR HOLE IN THE BONE. WHEREAS AN INCISED WOUND, YOU WOULD NOT NORMALLY EXPECT TO DO THAT, BUT IT COULD DEPENDING ON THE FORCE INVOLVED AND THE SHARPNESS OF THE BLADE.

THERE WERE THREE STAB WOUNDS HERE ON THE BACK OF THE NECK AND THEN IN THIS AREA, INCLUDING THE TOP OF THE LEFT SHOULDER, THE BACK OF THE LEFT ARM, THERE ARE TWENTY [1562] STAB WOUNDS, THE MAJORITY OF WHICH ARE GOING DOWNWARD. TWO OF THEM GO UP AND ALL OF THEM GO TOWARDS THE FRONT. THERE ARE TWO ON THE LOWER BACK, ONE HERE IN THE MIDLINE AND ONE ON THE RIGHT BUTTOCKS.

SO THERE ARE A TOTAL, INCLUDING THIS ONE ON THE BACK OF THE HEAD, OF THIRTY-ONE STAB OR INCISE WOUNDS NOT INCLUDING THE THREE THAT ARE HERE ON THE NECK THAT SHOW UP BETTER ON THE –

Q I SHOW YOU STATE'S –

A – BLOWUP OF THE NECK –

Q – STATE'S 63.

A SIXTY-THREE SHOWS JUST THE HEAD AREA FROM FOUR DIRECTIONS.

HERE ON THE FRONT OF THE NECK, YOU CAN SEE THERE'S A V-SHAPED INCISE WOUND. THIS IS CONSISTENT WITH THE KNIFE STARTING AT ONE POINT AND GOING ACROSS THE NECK AND THEN A SECOND CUT STARTING MOST PROBABLY HERE TO THE LEFT AND COMING ACROSS, BUT IT COULD ALSO BE FROM THE CENTER OF THIS AND GOING OUT. AND THERE WAS NO DEFINING PORTION OF THE INCISED WOUND TO TELL ME WHICH DIRECTION.

SOMETIMES A KNIFE, IF IT'S DULL ENOUGH WILL CAUSE A LITTLE WAVE OR A LITTLE PROJECTION OF SKIN WHERE IT CUTS AND THEN SLIPS AND YOU HAVE A LITTLE PROJECTION STICKING OUT WHICH TELLS YOU WHICH WAY THE KNIFE IS GOING. BUT IN THIS CASE, THIS WAS A NICE CLEAN CUT IN BOTH DIRECTIONS. [1563] SO IT COULD BE TWO IN THE SAME DIRECTION, IT COULD BE ONE IN EACH OF TWO DIRECTIONS.

ON THE RIGHT SIDE OF THE NECK IS AN ADDITIONAL INCISED WOUND. THIS ONE ON THE RIGHT SIDE IS VERY SHALLOW. THE TWO IN THE FRONT, ONE IS SHALLOW, THE ONE THAT COMES OFF AT AN ANGLE HERE. THE OTHER ONE IS DEEP ENOUGH TO COMPLETELY CUT THROUGH THE AIRWAY, WHICH IS YOUR TRACHEA AND TO CUT THROUGH THE SUPERFICIAL VESSELS IN THIS CASE THE JUGULAR VEINS IN THE NECK ON THE LEFT SIDE.

THE SIDE VIEW SIMPLY SHOWS THE SAME WOUNDS BUT SHOWS THEM FROM THE SIDE SO THAT YOU CAN GET AN APPRECIATION OF THE DIRECTION AND THIS – THIS SHOWS IN THIS CASE A NUMBER OF STAB WOUNDS HERE ON THE BACK, MOSTLY ON HER RIGHT SIDE, A FEW ON HER LEFT SIDE OF THE BACK. THESE ON THE UPPER NECK ARE ON THE LEFT SIDE AND THEN THERE ARE THESE WOUNDS ON THE RIGHT SIDE OF THE CHEST AND THE ONE THAT'S NEAR THE MIDLINE THAT'S ILLUSTRATED HERE WITH A YELLOW TYPE OF DRAWING TO INDICATE THAT IT'S ON THE OTHER SIDE OF THE BREAST AND DOES GO DOWNWARD INTO THE CHEST.

SOME OF THE ONES I'VE ILLUSTRATED AND WERE SHOWN HERE SHOWING THE DIRECTION WITH THE YELLOW LINES AND RED DOTTED LINES TO INDICATE THE DIRECTION THEY WENT INTO THE BODY. IT WAS DIFFICULT TO DO THAT ON THESE IN THE BACK BECAUSE THERE WERE SO MANY RIGHT THERE TOGETHER, BUT A FEW I HAVE SHOWN THE DIRECTION.

[1564] Q LET ME ASK YOU IN RELATION TO THE DIRECTION OF THE WOUNDS, DOCTOR, WHAT DOES THE CHANGING OF THE DIRECTION IN THE WOUNDS INDICATE TO YOU REGARDING MOVEMENT EITHER BY THE VICTIM, THE ASSAILANT, OR BOTH?

A IF WE FIND MULTIPLE STAB WOUNDS, THEY ARE ALL GOING EXACTLY THE SAME PARALLEL DIRECTION, IT GIVES THE IMPRESSION THAT THE PERSON, NEITHER PARTY MOVED DURING THE TIME THOSE STAB WOUNDS OCCURRED. THAT EITHER THE INDIVIDUAL WAS INCAPACITATED OR IN SOME WAY RESTRAINED AND THE PERSON DOING THE STAB DID NOT MOVE, BUT STABBED REPEATEDLY IN THE SAME AREA. THAT WAS NOT TRUE IN THIS CASE. ALMOST ALL OF THESE WENT IN DIFFERENT DIRECTIONS, EITHER LEFT OR RIGHT.

AS I MENTIONED, THE ONES ON THE BACK, ALMOST ALL OF THEM WENT DOWNWARD EXCEPT FOR TWO, BUT SOME WOULD GO TO THE RIGHT, SOME TO THE LEFT, SOME STRAIGHT IN. SO MOST ALL OF THEM WENT IN ROUGHLY DIFFERENT DIRECTIONS WITH THE EXCEPTIONS TO THE ONES

ON THE RIGHT SIDE, ALL OF WHICH WENT FROM RIGHT TO LEFT, BUT EVEN IN THAT CASE, THOSE ON THE RIGHT SIDE DID GO – ONE OF THEM GOES DOWNWARD HERE IN THE FRONT OF THE CHEST. THE OTHER TWO GO SOME – ONE TO THE BACK, ONE TOWARDS THE FRONT. SO THERE WAS INDICATION THAT THERE WAS PROBABLE MOVEMENT BETWEEN THE TWO PARTIES EITHER BY THE PERSON DOING THE STABBING OR THE PERSON RECEIVING THE STAB WOUNDS OR BOTH.

[1565] Q DOCTOR, LET ME ASK YOU THIS ABOUT THE CONDITION OF MS. SHEALY'S BODY UPON RECEIPT BY YOU, WAS THE BODY CLOTHED?

A AT THE TIME WE RECEIVED THE BODY, THE BODY – IF MY MEMORY – LET ME CHECK MY PHOTOGRAPHS. I KNOW SOME OF THE CLOTHING HAD BEEN – NO, THE BODY WAS CLOTHED AND IT WAS JUST AS IT WAS FOUND. THERE WAS NO EFFORT TO TRY TO EXAMINE THE PERSON AT THE SCENE OR TO RESUSCITATE. SO SHE WAS CLOTHED.

Q LET ME ASK YOU THIS. WAS THERE ANY FOREIGN, ANY FOREIGN ITEMS ATTACHED TO THE CLOTHING OF THE VICTIM UPON YOUR RECEIPT OF THE VICTIM?

A FOREIGN ITEMS ATTACHED –

Q ON THE FRONT –

A – TO THE CLOTHING OF THE VICTIM. WE LOOKED FOR TRACE EVIDENCE. LET ME CHECK MY EVIDENCE TRANSFER. I DON'T SPECIFICALLY

RECALL WHAT WE FOUND, BUT GIVE ME JUST A MOMENT AND I'LL CHECK THAT.

Q WELL, LET ME ASK IT THIS WAY. DID YOU RECEIVE OR TAKE FROM THE BODY OF SHIRLEY SHEALY AND LATER TRANSFER TO STEVE CLARE OF BATESBURG-LEESVILLE POLICE DEPARTMENT A SUM OF MONEY WHICH WAS ATTACHED TO THE BODY OF SHIRLEY SHEALY?

A YES, WE DID. THE PHOTOGRAPHS DO SHOW THAT THERE WERE DOLLAR BILLS STUCK TO THE FRONT OF THE BODY BECAUSE THERE WAS A GREAT DEAL OF BLOOD ON THE FRONT OF THE BODY.

[1566] IN FACT, NORMALLY A PERSON STABBED ONCE OR TWICE, WE'LL FIND ABOUT A QUART AND A HALF OF BLOOD INTERNALLY BECAUSE IT TAKES THAT MUCH TO BLEED TO DEATH, BUT IN THIS CASE BECAUSE OF THE MULTIPLE WOUNDS, ALL OF THAT HAD BLED OUT EXCEPT FOR ABOUT 50 CC'S, WHICH IS ABOUT A FOURTH OF A CUP OF BLOOD. AND WE DID FIND A NUMBER OF DOLLAR BILLS, THREE TWENTY'S, EIGHT FIVE'S AND TWO ONE'S THAT WERE STUCK TO THE FRONT OF THE BODY.

Q DOCTOR, REGARDING THE CONDITIONAL [sic] OF MS. SHEALY'S ARMS AND HANDS AT THE TIME OF THE AUTOPSY, DO YOU RECALL WHAT CONDITION SHE WAS IN WHEN YOU RECEIVED HER?

A WHEN WE RECEIVED HER, HER ARMS AND HANDS WERE BEHIND HER BACK AND WERE HELD

IN PLACE BY GRAY DUCT TAPE. THE DUCT TAPE WAS AROUND HER WRISTS.

Q DID YOU, IN FACT, REMOVE THAT DUCT TAPE OR AT YOUR DIRECTION, WAS IT REMOVED?

A RIGHT. WE REMOVED THE DUCT TAPE.

Q AND THAT WAS LATER PROVIDED TO AN AGENT FROM S.L.E.D., WHO WAS THERE WHO LATER TRANSPORTED IT AWAY FROM THE SCENE?

A THAT'S RIGHT, JOHN –

Q FROM THE AUTOPSY?

A – JOHN BLACK FROM S.L.E.D. PICKED UP THAT EVIDENCE.

Q YES, SIR.

DID YOU HAVE AN OPPORTUNITY TO OBSERVE HER HANDS; [1567] THAT IS – WELL, LET ME ASK YOU THIS. GENERALLY THE CONDITION OF THE BODY, WAS THE BETTER PORTION OF THE BODY BLOOD SOAKED OR NOT BLOOD SOAKED?

A THERE WAS MORE BLOOD ON THE BODY – MOST OF THE BODY DID HAVE BLOOD ON IT. PRIMARILY ON THE FRONT OF THE BODY, BUT THERE WAS SOME ON THE BACK.

Q LET ME ASK YOU THIS, REGARDING THE HANDS, DID THERE APPEAR TO BE EVIDENCE OF BLOOD, AT LEAST, TO THE HUMAN EYE ON THE HANDS?

A LET ME REFER TO MY PHOTOGRAPHS JUST ONE MOMENT.

Q YES, SIR.

A THE BLOOD IS PRIMARILY ON THE FRONT OF THE BODY AND THE UPPER PART OF THE BODY. THE HANDS APPEAR TO BE ROUGHLY FREE OF BLOOD. THERE MAY BE SOME TINY SPOTS, BUT THERE'S CERTAINLY NO BLOOD SMEARED ON THE HANDS.

Q LET ME SHOW YOU STATE'S EXHIBIT NUMBER 23, A PICTURE FROM THE SCENE. NOW, IS THAT PHOTOGRAPH, THE PICTURE AT THE SCENE CONSISTENT WITH THE PHOTOGRAPHS THAT YOU TOOK AT THE AUTOPSY REGARDING THE CONDITION OF THE HANDS?

A YES. IT LOOKS THE SAME AS FAR AS THE CONDITION OF THE HANDS. THERE'S NO BLOOD VISIBLE ON THIS PHOTOGRAPH OR ON MINE OF THE HANDS.

Q THANK YOU.

DOCTOR, TELL THE JURY THE DAMAGE CAUSED BY THESE WOUNDS; THAT IS, WHICH OF THESE WOUNDS COULD HAVE BEEN [1568] FATAL AND WHAT DAMAGE WAS DONE TO THE INTERNAL ORGANS OF MS. SHEALY AS A RESULT OF THE WOUNDS?

A THE FIVE WOUNDS IN THE FRONT OF THE CHEST, PARTICULARLY THIS ONE THAT WENT INTO THE LUNG, AS WELL AS THESE THREE THAT WENT INTO THE LIVER, RECOGNIZING YOUR LIVER IS RIGHT UNDER YOUR DIAPHRAGM AND SO A STAB WOUND THAT GOES INTO YOUR CHEST THROUGH THE DIAPHRAGM AND INTO THE LIVER, THEN

BLEEDS INTO THE LUNG CAVITY AS OPPOSED TO THE ABDOMINAL CAVITY BECAUSE THE STAB WOUNDS DIDN'T GO ALL THE WAY THROUGH THE LIVER. THEY JUST OPENED UP A HOLE IN THE TOP OF IT SO IT COULD BLEED INTO THE LUNG CAVITY.

SO THESE FIVE WOUNDS, THIS ONE IN THE CHEST, HIGH IN THE MIDLINE TO THE RIGHT AND THESE FOUR ALL CAUSED BLEEDING INTO THE RIGHT CHEST.

FIVE OF THESE STAB WOUNDS IN THE BACK CAUSED SIX STAB WOUNDS IN THE BACK OF THE RIGHT LUNG AND THAT'S BECAUSE ONE OF THESE WOUNDS, THIS LARGE ONE, THE KNIFE WENT IN, CAME OUT PART WAY, AND THEN WENT IN AGAIN; THEREFORE, CAUSING A LARGER HOLE EXTERNALLY AND THEN TWO STAB HOLES INTERNALLY IN THE LUNG.

SO THERE WERE A TOTAL OF SEVEN STAB HOLES IN THE RIGHT LUNG. FIVE FROM THE – I'M SORRY, SIX FROM THE REAR, ONE FROM THE FRONT AND THREE IN THE LIVER, ALL OF WHICH CONTRIBUTED TO BLEEDING INTO THE RIGHT LUNG CAVITY.

OUR LUNG IS LIKE A BUBBLE THAT YOU MIGHT BLOW [1569] WITH BUBBLE GUM IN YOUR MOUTH. IF YOU SUCK THAT BUBBLE GUM IN, YOU PRODUCE A BUBBLE THAT'S IN A CAVITY. IF YOUR LUNG OR THE BUBBLE COLLAPSES, THEN YOU HAVE AN EMPTY CAVITY THAT CAN FILL UP WITH BLOOD. SO YOU CAN BLEED TO DEATH INTERNALLY WITHOUT EVEN SEEING BLOOD EXTERNALLY FROM A STAB

WOUND THAT DOESN'T HAPPEN TO BLEED A LOT EXTERNALLY.

IN ADDITION TO THESE STAB WOUNDS OF THE CHEST THAT CAUSED HEMORRHAGE INTO THE RIGHT CHEST CAVITY, THE CUT IN THE NECK, PARTICULARLY THIS ONE ON THE FRONT THAT WENT THROUGH THE AIRWAY AND WENT THROUGH THE JUGULAR VEIN, CONTRIBUTED TO DEATH. WE DID NOT SEE AIR EMBOLIZATION IN THE HEART, WHICH IS ONE WAY TO DIE FROM A CUT IN THE NECK BECAUSE THE AIR GETS IN THERE AND IT'S NO LONGER ABLE TO PUMP BLOOD BECAUSE THERE'S AN AIR LOCK IN THE SYSTEM, BUT THERE WAS BLEEDING FROM THIS AREA.

SO HER DEATH, IN MY OPINION WITHIN REASONABLE MEDICAL CERTAINTY, WAS FROM THE BLEEDING, BOTH FROM THE NECK AND INTO THE RIGHT CHEST CAVITY, FROM THE MULTIPLE STAB WOUNDS OF THE RIGHT SIDE OF THE CHEST AND THE BACK, AS WELL AS THE CUT IN THE NECK.

Q DOCTOR, I'VE REALLY GOT ONE OTHER AREA I WANT TO ADDRESS WITH YOU.

TYPICALLY, WHEN THERE IS AN ASSAULT, PARTICULARLY WITH A KNIFE AND A VICTIM'S OR THE ONE WHO IS RECEIVING THE ASSAULT, THEIR HANDS ARE UNBOUND, WOULD YOU MOST OFTEN SEE [1570] EVIDENCE OF DEFENSIVE WOUNDS OR NOT DEFENSIVE WOUNDS?

A MORE OFTEN THAN NOT, IT'S BEEN MY EXPERIENCE THAT THE PERSON IF THEY ARE ABLE

TO DEFEND THEMSELVES WILL HAVE WHAT WE REFER TO AS DEFENSIVE WOUNDS, WHICH ARE CUTS ON THE HANDS OR FOREARMS OR IF THEY ARE DOWN ON THEIR BACK, ON THEIR LEGS. ANYTHING THEY CAN PUT UP IN FRONT OF THE KNIFE TO KEEP IT FROM GETTING TO THEM. AND SO MOST OF THE TIME IN A PERSON THAT IS KILLED WITH A KNIFE, WE DO SEE DEFENSIVE WOUNDS.

Q AND IN THIS CASE, WAS THERE EVIDENCE OF DEFENSIVE WOUNDS?

A NO, THERE WAS NOT. THERE WERE NO CUTS ON THE FOREARMS OR THE HANDS.

[1594] **CLOSING ARGUMENTS BY THE SOLICITOR**

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WHAT THE DEFENSE IS DOING IN THIS CASE, LADIES AND GENTLEMEN, IS TRYING TO GET EACH AND EVERY ONE OF YOU TO GRASP A SOFT SIDE, TRY TO GRASP ON SOMETHING THAT JUST DOESN'T QUITE MAKE SENSE, JUST SOFTENS IT A LITTLE BIT WHERE EVEN MAYBE WE'RE DEALING WITH VOLUNTARY MANSLAUGHTER AND THAT'S IT; OR MAYBE WE'VE JUST GOT MURDER AND NO ARMED ROBBERY. MAYBE IF WE SOFTEN IT ENOUGH, THERE'S NO KIDNAPPING. HOW ARE THEY SOFTENING THIS, LADIES AND GENTLEMEN? TRYING TO FIT THE STORY OF WILLIAM ARTHUR KELLY WITH THE

CIRCUMSTANCES OF THAT DAY. HOW HAVE THEY DONE THAT?

THE BOTTOM LINE IS THE STATEMENT GIVEN BY WILLIAM ARTHUR KELLY, WHILE IT DOES CONCEDE CERTAIN FACTS WHERE HE KNEW HE WAS TO PUT IT QUITE BLUNTLY, BUSTED. HE WAS BUSTED IN LOWELL, MASSACHUSETTS, BUT THEN HE CHOSE, I SUBMIT TO YOU, TO LIE, TO LIE ABOUT SHIRLEY SHEALY, TO LIE ABOUT HOW HE KILLED HER, TO LIE ABOUT HOW SHE ACTED THAT DAY.

WE'RE GOING TO WALK THROUGH THOSE. MOST APPROPRIATELY PUT, THE LIES AND TIMES OF BILLY KELLY –

MR. KIRKLAND: OBJECTION, YOUR HONOR.

I THINK HE CAN COMMENT ON WHAT THE STATEMENT SAYS, BUT BY CHARACTERIZING, LABELING THAT, I THINK, IS IMPROPER.

THE COURT: I'LL SUSTAIN THE OBJECTION.

IF YOU WOULD, PLEASE, REFER TO THE STATEMENT IF [1595] THAT'S WHAT YOU ARE REFERRING TO.

MR. CHASE: YES, SIR, YOUR HONOR.

MR. KIRKLAND: YOUR HONOR – I'M SORRY, I DON'T MEAN TO INTERRUPT –

MR. CHASE: YOUR HONOR, I'LL TELL YOU WHAT. I'LL MARK THAT WORD OFF OF THERE –

THE COURT: ALL RIGHT, SIR.

MR. CHASE: – AND SUBMIT TO THIS JURY THAT THE EVIDENCE CERTAINLY SUPPORTS IT.

THE COURT: ALL RIGHT, SIR.

MR. CHASE: YOUR HONOR, FOR FUTURE REFERENCE, THESE ARE DIRECT QUOTATIONS FROM THAT STATEMENT WHICH IS ADMITTED INTO EVIDENCE AND THAT IS FOR THE JURY'S VIEW SO I CAN FOCUS ON THAT, SIR.

THE COURT: ALL RIGHT, SIR.

MR. CHASE: THANK YOU, YOUR HONOR.

IT BEGINS, LADIES AND GENTLEMEN, HE DOESN'T EVEN TELL YOU THE TRUTH ABOUT HOW LONG IT'S BEEN SINCE HE'S BEEN – HAD BEEN AT KENTUCKY FRIED CHICKEN. THAT SEEMS LIKE A SMALL POINT. THAT'S A SMALL POINT, BUT THAT'S THE WAY IT STARTED. IT'S BEEN A LONG TIME SINCE I WORKED THERE.

WHAT DOES THE DEFENSE WANT YOU TO BELIEVE IN THIS CASE? WHAT SOFTENS THE EVIDENCE? THERE WAS NO PLAN BY WILLIAM ARTHUR KELLY TO DO ANYTHING THAT DAY. THAT THERE WAS NO PLAN BY HIM TO GO TO THE KENTUCKY FRIED CHICKEN AND [1596] FORCE SHIRLEY SHEALY TO OPEN THAT SAFE TO GET MONEY, TO KILL HER AND TO RUN. IS THERE EVIDENCE OF THAT?

FIRST OF ALL, LET'S GO INTO THE FACT THAT – I'M SURE THE DEFENSE WANTS YOU TO BELIEVE THIS WAS A RANDOM MEETING. WE JUST HAPPENED TO HOOK UP. IT JUST PLAYED OUT THAT WAY.

THE FIRST THING WE DEAL WITH, LADIES AND GENTLEMEN, WILLIAM ARTHUR KELLY TALKS ABOUT HOW HE PULLS UP. WE KNOW THAT THIS RESTAURANT IS CLOSED. WE KNOW THAT IT'S PROBABLY AFTER TEN-THIRTY. YOU CAN LOOK AT THE STATEMENT OF MS. BARBARA ADAMS. SHE TALKS ABOUT LEAVING AT 10:24. THE LIGHTS ARE OUT. MAYBE A COUPLE OF LIGHTS INSIDE. THERE'S ONE CAR AT THAT RESTAURANT. I'M GOING BACK TO SEE THE GIRLS. WELL, THERE'S ONE WOMAN THERE AND IT'S THE WOMAN THAT HE HATES. THE WOMAN WHO SUPPOSEDLY HIT ON HIM ALL THE DAY; THE WOMAN WHO SUPPOSEDLY WANTED TO HAVE SEX WITH HIM. THIS 25-YEAR-OLD WOMAN WHO SUDDENLY WANTS BILLY KELLY. SO IT'S A RANDOM MEETING. WE ALSO KNOW IF IT'S NOT – IF IT'S A RANDOM MEETING, WHY DOES BILLY KELLY NOT PARK OUT FRONT. WHY DOES HE NOT JUST PARK RIGHT THERE (INDICATES), HERE (INDICATES), HERE (INDICATES), HERE (INDICATES). ANYWHERE IN THIS PARKING LOT IF HE'S JUST GOING IN TO SEE THE GIRLS. JUST GOING BACK TO VISIT THE GIRLS I USED TO WORK WITH AFTER HE SPENT FOUR HOURS WITH THEM THAT DAY. HOW DO WE KNOW THAT HE DIDN'T PARK THERE? [1597] WE KNOW FROM JASON HITE THAT THERE WAS ONE CAR IN THAT PARKING LOT. NOW, JASON HITE, THERE'S NO QUESTION ABOUT IT, ON DIRECT, HE SAID I DIDN'T SEE THE VICTIM. ON CROSS, HE GOT CONFUSED AND HE ADMITTED THAT WAS IN HIS STATEMENT. THAT'S SOMETHING YOU ARE JUST GOING TO HAVE TO GIVE WHATEVER WEIGHT YOU WON'T, BUT

YOU'VE GOT TO LOOK AT ALL OF THE CIRCUMSTANCES SURROUNDING IT TO SEE IF THAT MAKES ANY SENSE.

NOW, DID STEVE CLARE SEE ANOTHER CAR IN THAT PARKING LOT? NO, MA'AM, NO, SIR. NO ONE ELSE IS IN THAT PARKING LOT. WE ALSO KNOW THAT THE BLOODHOUNDS, AMAZINGLY ENOUGH, TRACK A TRAIL OVER THIS FENCE BACK TO HERE WHERE THERE ARE MARKS WHERE A CAR WOULD HAVE PULLED AWAY.

NOW, LADIES AND GENTLEMEN, IF WILLIAM KELLY IS PARKED THERE, CERTAINLY STEVE CLARE WOULD HAVE SEEN IT AND THERE WOULD HAVE BEEN NO NEED FOR HIM TO HOP OVER THAT FENCE. NOW, THEY MAY SAY, THAT COULD HAVE BEEN ANYONE HOPPING OVER THAT FENCE. THEY MAY SAY, WELL, THEY DIDN'T SEE ANY – THEY DIDN'T GET ANYTHING OVER HERE NEAR SHIRLEY SHEALY'S CAR WHERE IT WAS PARKED BEFORE. THERE WAS NO BLOODHOUND TRAIL OVER THERE.

WELL, FIRST OF ALL, IF SOMEONE ELSE IS LEAVING THE KENTUCKY FRIED CHICKEN FOR A NORMAL REASON – YOU REMEMBER AGENT JACKSON WHEN HE TESTIFIED – HE TALKED ABOUT HE WENT THIRTY FEET DOWN HERE AND WENT AROUND THE FENCE, [1598] THIS SIX-FOOT FENCE.

NOW, ALL I KNOW IS IF I'VE GOT A BUCKET OF CHICKEN FROM THE KENTUCKY FRIED CHICKEN, I'M NOT HOPPING A SIX-FOOT FENCE AND RUNNING THAT WAY WHEN I CAN JUST WALK AROUND. THERE'S ONLY ONE REASON A PERSON WOULD DO

THAT AND THAT'S BECAUSE THEY'RE RUNNING FROM THE LAW BECAUSE WILLIAM ARTHUR KELLY HAD JUST SLAIN, KILLED, SLIT THE THROAT OF SHIRLEY SHEALY.

NOW, WHAT ABOUT OVER HERE? THERE WEREN'T ANY TRACKS OVER HERE. WELL, AGENT JACKSON TOLD YOU WHEN HE STOOD UP THERE. THEY HAD TO START THEIR PERIMETER VERY WIDE BECAUSE THERE WAS CONTAMINATION WHEN THEY WERE SECURING THE SCENE. HE DIDN'T GET A HIT UNTIL RIGHT ON THE FENCE WHERE HE HAD GONE OVER.

IN OTHER WORDS, THE DOG DID EXACTLY WHAT HE WAS SUPPOSED TO DO. HE DIDN'T HIT ON ALL THE OTHER LAW ENFORCEMENT PERSONNEL'S TRACKS THAT WERE IN THAT PARKING LOT. HE HIT EXACTLY WHERE HE WAS SUPPOSED TO. WILLIAM ARTHUR KELLY WASN'T PARKED OUT FRONT. HE'S NOT PARKED NEAR THE ENTRANCE. YOU DECIDE WHETHER THAT'S THE TRUTH OR A LIE.

IT'S A RANDOM MEETING. THIS IS A REALLY INTERESTING POINT TO ME. WILLIAM ARTHUR KELLY SHOWS UP BETWEEN 10:30 AND 10:45 THAT DAY AND WHAT DOES HE DO. HE GOES IN. HE SEES THAT SHIRLEY SHEALY'S CAR IS OUT THERE. [1599] THE WOMAN HE HATES, THE WOMAN HE DOESN'T WANT TO BE AROUND, THE WOMAN HE QUIT K.F.C. FOR, AND WHAT DOES HE DO? HE GOES IN. WHAT IS THE FIRST THING, ACCORDING TO HIS STATEMENT, WHAT IS THE FIRST THING THAT HE DOES? DOES HE GO TO THE FRONT COUNTER HERE? HE

DOESN'T SEE HER. DOES HE GO TO THE FRONT COUNTER AND LOOK OVER AND SAY, HEY, SHIRLEY. NO. WILLIAM ARTHUR KELLY SAYS I GO IN HERE; I GO ALL THE WAY BACK HERE; I GO ALL THE WAY BACK IN HERE; I FOLLOW ALL THE WAY UP TO HERE TO SHIRLEY SHEALY.

NOW, HE SAYS, I CAME IN THIS DOOR AND SAID, HEY, SHIRLEY, AND SHE TURNED AROUND AND ACKNOWLEDGED ME. TAKE A LITTLE BIT CLOSER LOOK AT THAT STATEMENT. WHAT DOES HE SAY? I SAW THAT THE SAFE WAS OPEN.

LADIES AND GENTLEMEN, IF YOU ARE STANDING BACK HERE AND SHE TURNS AROUND AND THAT SAFE IS IN THAT ROOM, HOW IN THE WORLD DOES HE KNOW THAT THAT SAFE IS OPEN. WILLIAM ARTHUR KELLY IS RIGHT THERE WITH SHIRLEY SHEALY. WILLIAM ARTHUR KELLY IS FORCING HER TO OPEN THAT SAFE. WILLIAM ARTHUR KELLY HAS THAT KNIFE OUT ON HIM AT THAT POINT. HE'S GOT THE PERFECT VICTIM. HE'S GOT A PREGNANT LADY. IS SHE GOING TO DO WHAT HE SAYS? YES, MA'AM, YES, SIR. RANDOM MEETING. LADIES AND GENTLEMEN, IF THIS IS A RANDOM MEETING, WHY – WHY IN THE WORLD DOES WILLIAM ARTHUR KELLY BRING THIS KNIFE. WE ARE NOT TALKING ABOUT A POCKETKNIFE. [1600] THIS IS A DAGGER. IT ISN'T SOMETHING THAT YOU JUST KIND OF USE TO CLEAN YOUR FINGERNAILS. THIS IS SOMETHING YOU USE TO STAB. THERE'S NO QUESTION THAT'S HIS AND THERE'S NO QUESTION HE BROUGHT IT THERE THAT NIGHT. WELL, HE JUST HAS THAT FOR HIS PROTECTION. WELL, THAT MAKES SENSE. AND

WHY, LADIES AND GENTLEMEN, DOES WILLIAM ARTHUR KELLY BRING THESE GLOVES? IT'S A RANDOM MEETING. I JUST HAPPENED TO HAVE THESE. WILLIAM ARTHUR KELLY DECIDED TO DO A LITTLE SURGERY THAT NIGHT. SURGERY ON SHIRLEY SHEALY. IF WILLIAM ARTHUR KELLY HASN'T PLANNED THIS, WHY IS HE WORRIED ABOUT HIS PRINTS BEING ON THE SCENE? WHY IS HE WORRIED ABOUT IF HE TOUCHES SOMETHING, IT'S GOING TO LEAVE SOMETHING BEHIND? HOW DO YOU KNOW THAT THERE WAS A GLOVE ON HIS HANDS THAT NIGHT.

FIRST OF ALL, HE TALKS ABOUT IT IN HIS STATEMENT. I HANDLED THE DUCT TAPE. I TAPED HER UP. IN FACT, HE TALKS ABOUT USING IT, NOT ONLY AT THE CHAIR, BUT HE TALKS ABOUT IT LATER ON DOWN THE HALLWAY WHEN SHE'S GRASPING [sic] FOR AIR AND I WANTED TO PREVENT HER FROM DOING ANYTHING. WELL, IF HE HAS HANDLED THIS SO MUCH, WHY – WHY AREN'T THERE ANY PRINTS ON THIS? AGENT BLACK EVEN TOLD YOU, THAT'S WHAT ALL OF THIS IS. THAT'S PROCESSING. LOOKING FOR PRINTS. NO PRINTS. WILLIAM ARTHUR KELLY WAS WEARING THAT GLOVE.

LADIES AND GENTLEMEN, YOU HAD THAT LATEX TIP. IT WAS ACTUALLY ON – THIS EVIDENCE ON THAT CHAIR AT THE TEAR [1601] POINT. DID YOU HEAR STEVE DERRICK – AGENT DERRICK TALK ABOUT THAT? AT THE TEAR POINT. THAT MAKES SENSE, DOESN'T IT? IF YOU ARE TEARING THIS TAPE OFF, IF EVER IT'S GOING TO RIP, THAT'S GOING TO BE THE TIME. LEFT IT BEHIND. DIDN'T LEAVE A

FINGERPRINT. LUCKY FOR US, HE LEFT WHAT WAS COVERING UP HIS FINGERPRINTS.

LADIES AND GENTLEMEN, WHAT ELSE DID HE BRING TO THIS RANDOM MEETING WITH SHIRLEY SHEALY THAT THE DEFENSE WOULD LIKE FOR YOU TO IGNORE. THERE'S NO PLAN HERE. THE DUCT TAPE. THERE'S NO DUCT TAPE IN THAT STORE. WELL, I DON'T SEE HOW THIS IS SOMETHING, YOU KNOW, EVEN IF YOU BELIEVE THAT HE CARRIED THIS AROUND IN HIS POCKET FOR PROTECTION AND FOR SOME REASON HE'S GOT SOME FETISH FOR KEEPING GLOVES IN HIS POCKET AND WHERE ARE YOU KEEPING THIS IF YOU ARE GOING TO THE ZOO IN COLUMBIA, SOUTH CAROLINA. WHAT SENSE DOES THAT MAKE?

THE DEFENSE WANTS YOU TO IGNORE THAT. THEY WANT YOU TO BELIEVE IT WAS A RANDOM MEETING. DID HE HAVE ACCESS TO THOSE GLOVES? ABSOLUTELY. WHERE? MCDONALD'S. THE PLACE WHERE HE WORKED.

NOW, THEY ALSO WANT YOU TO IGNORE THE CONDITION OF THAT VEHICLE. SHIRLEY SHEALY'S CAR IS FOUND. THAT GAS CAN TIPPED OVER IN THE BACK. SECURE ON THE FLOORBOARD OF THAT IS A TIPPED OVER GAS CAN. NO ONE ELSE WAS IN THE BACK OF THE CAR THAT NIGHT. SHIRLEY SHEALY CERTAINLY WASN'T. [1602] SHE'S DRIVING THE CAR. THEY WANT YOU TO IGNORE THAT.

ANOTHER POINT IS THEY WANT YOU TO IGNORE THE FACT THAT HOW IN THE WORLD WOULD WILLIAM ARTHUR KELLY BE ABLE TO GET

MONEY FROM THE KENTUCKY FRIED CHICKEN. WHO WOULD HE NEED? COULD HE BREAK IN AND JUST GET IN THE SAFE? NO. WHAT WOULD HE NEED? WHO WOULD HE NEED? HE WOULD NEED THE CODE TO THE COMBINATION LOCK ON THAT FLOOR SAFE. WHO HAD THE CODE? SHIRLEY SHEALY. WHO IS THE PERFECT VICTIM? SHIRLEY SHEALY. WHAT ELSE DOES HE NEED? THE MANAGER. WHO IS THE MANAGER? SHIRLEY SHEALY. BUT IT'S JUST A RANDOM MEETING. SHE ALREADY HAD THE SAFE OPEN. GIVE THAT WHAT WEIGHT YOU THINK IT DESERVES.

HIS STORY IS THAT SHIRLEY WANTED ME. SHIRLEY SHEALY WANTED ME AND JUST AN AFTERTHOUGHT, THAT I TOOK THAT MONEY. SHIRLEY SHEALY, ACCORDING TO THE DEFENDANT, WANTED TO HAVE SEX WITH HIM. THIS IS A WOMAN SUPPOSEDLY WHO GOT OUT OF HER CAR, LEFT IT RUNNING. SHE WAS GOING HOME TO HER HUSBAND, A HUSBAND THAT IS APPARENTLY JEALOUS ACCORDING TO HIS STATEMENT, AND WHAT DOES SHE DO? SHE'S ALREADY CLOSED BECAUSE SHE KNOWS SHE NEEDS TO BE GETTING HOME. SHE SEES MR. KELLY WALK IN AND SHE DECIDES, WELL, I'M NOT GOING TO WORRY ABOUT MY HUSBAND; I'M NOT GOING TO WORRY ABOUT MY CAR RUNNING OUTSIDE. SUDDENLY, SHE WAS OVERCOME WITH PASSION FOR WILLIAM ARTHUR KELLY, A 17-YEAR-OLD BOY IN HIS HORMONAL PRIME, HAS A 25-YEAR-OLD WOMAN SUPPOSEDLY AFTER HIM IN THIS [1603] KENTUCKY FRIED CHICKEN. NO PLAN TO ROB.

IT ALSO TALKS ABOUT THE CIRCUMSTANCES OF THE CRIME. FIRST OF ALL, IT TALKS ABOUT SHE WANTED ME TO TAPE HER HANDS BEHIND ME [sic].

LADIES AND GENTLEMEN, SHIRLEY SHEALY WAS FOUND IN THE AUTOPSY, HER HANDS WERE DUCT-TAPED TOGETHER BEHIND HER. THE TESTIMONY – AND YOU REMEMBER IT HOW YOU WANT OR HOW YOU HEARD – WAS THAT HER HANDS WERE DUCT-TAPED TOGETHER. IT WASN'T DUCT-TAPED AROUND HER WAIST. IT WASN'T DUCT-TAPED ANYPLACE ELSE. WILLIAM ARTHUR KELLY SAYS, WELL, WHEN SHE'S SITTING THERE, SHE GETS UP AND SHE FREES ONE HAND. WELL, IF SHE FREES ONE HAND, SHE FREES BOTH. NOT ACCORDING TO WILLIAM ARTHUR KELLY. THAT DOESN'T MAKE ANY SENSE.

WHAT DO YOU HEAR FROM STEVE DERRICK? WILLIAM ARTHUR KELLY TELLS YOU THAT NOTHING HAPPENED IN THAT CHAIR. THAT SHE WAS DUCT-TAPED THERE, BUT SHE GOT FREE AND STARTED CHASING HIM. AGENT DERRICK TOLD YOU JUST THE OPPOSITE. AGENT DERRICK TOLD YOU THAT AT LEAST A MINIMUM OF TWO BLOWS TOOK PLACE IN THAT CHAIR. BLOOD SPATTER, SENT BLOOD ALL OVER THE PLACE.

LADIES AND GENTLEMEN, EVEN IF YOU IGNORE THIS DIAGRAM, YOU CAN LOOK AT THE BLOOD AROUND THIS CHAIR ON EITHER ONE OF THESE DIAGRAMS. BUT NOTHING HAPPENED THERE. THAT WAS THE POINT WHERE SHE WAS JUST GETTING UPSET AND [1604] STARTED REALLY WANTING ME.

EVEN AFTER I CUT HER, SHE KEPT GRABBING AT ME, SO I KEPT STABBING HER.

LADIES AND GENTLEMEN, AS WILLIAM ARTHUR KELLY DESCRIBED IT, HE SLIT HER THROAT AND HE CONTINUES TO STAB HER AS THEY RUN DOWN THROUGH HERE. HER APPARENTLY GOING AFTER HIM ACCORDING TO HIS STATEMENT. IS THAT WHAT THE EVIDENCE SHOWS? THE EVIDENCE FORENSICALLY. THE EVIDENCE THAT CAN'T LIE. THE EVIDENCE FORENSICALLY SHOWS SHE WAS CUT HERE AND SHE WAS CUT BRUTALLY IN BOTH PLACES.

NOW, HE WANTS TO SAY NOTHING EVEN HAPPENED OVER HERE. WELL, WE KNOW THE DUCT TAPE IS IN THERE AND HERE'S ANOTHER POINT.

I WANT YOU TO LOOK AT THIS WHEN IT GETS BACK INTO THE JURY ROOM. LOOK AT THAT NAME TAG. THAT WAS THE NAME TAG THAT AGENT DERRICK DESCRIBED TO YOU WAS SHIRLEY SHEALY'S. WELL, IF SHIRLEY SHEALY IS NOT IN ANY PERIL THERE, IF THERE IS NOTHING GOING WRONG THERE, WHY IN THE WORLD IS HER NAME TAG THERE. IT'S MORE EVIDENCE OF A STRUGGLE. THAT'S MORE EVIDENCE THAT SHE WAS FORCED TO DO THAT.

ANOTHER POINT IS THAT MR. KELLY WANTS YOU TO BELIEVE THAT BOTH OF HER HANDS WERE FREE. THE EVIDENCE JUST DOESN'T SUPPORT IT, LADIES AND GENTLEMEN. DR. SEXTON SAID ON THE STAND – HOW MANY TIMES HAS HE TESTIFIED? OVER SIX HUNDRED. HOW MANY AUTOPSIES HAS

HE DONE? OVER TEN THOUSAND. THERE'S NO BLOOD ON HER HANDS, LADIES AND [1605] GENTLEMEN. IF WE KNOW THAT SHE IS CUT HERE AT LEAST TWO TIMES RESULTING IN SPATTER ALL OVER THERE, RESULTING IN BLOOD ALL OVER THAT CHAIR, SHE'S GOING TO HAVE SOME BLOOD ON HER HANDS. NEVER ANY BLOOD ON HER HANDS. NOT EVEN AFTER SHE'S STABBED THIRTY-ONE TIMES, HER THROAT IS SLIT, SHE IS BASICALLY GIVEN A HATCHET WOUND IN THE BACK OF HER HEAD. NOT A DROP OF BLOOD.

NOW, YOU MAY HEAR HOW THE COAT WAS OVER HER HANDS. WELL, HER HANDS WOULD STILL HAVE TO BE BEHIND HER. THE ENTIRE TIME, NOT A DROP OF BLOOD. NO DEFENSIVE WOUNDS. I GUESS BECAUSE SHE WAS IN THE THRONGS OF PASSION THAT IT WAS OKAY FOR HIM TO STAB HER. HE JUST WANTED – SHE JUST WANTED TO GRAB HIM. SHE WASN'T WORRIED ABOUT THE FACT THAT THIS KNIFE IS DIVING IN HER BODY THIRTY-ONE TIMES.

COMMON SENSE. WHAT IS SHE GOING TO DO? SHE'S GOING TO BE COVERING UP. SHE'S GOING TO BE TRYING TO AVOID IT. SHE'S PREGNANT. DOES THAT MAKE SENSE? DOES THAT SOFTEN THIS CRIME?

ANOTHER POINT, THEY WANT YOU TO BELIEVE THERE MAY NOT HAVE BEEN AN ARMED ROBBERY HERE BECAUSE THERE WAS NO PLAN TO DO THAT.

IN THIS CASE, WILLIAM ARTHUR KELLY THOUGHT ABOUT IT AFTERWARDS TO GET THE

MONEY BECAUSE SHIRLEY SHEALY WAS JUST THERE GETTING THE MONEY OUT OF THE OPEN SAFE.

LADIES AND GENTLEMEN, THE MONEY IS UNDERNEATH [1606] SHIRLEY SHEALY. HOW DO YOU GO BACK TO A SAFE AND GET MONEY THAT'S NOT THERE? IT JUST DOESN'T MAKE SENSE. IT DOESN'T ADD UP. COMMON SENSE.

WILLIAM ARTHUR KELLY WANTS YOU TO BELIEVE THAT THE REASON THAT HE DID NOT GO OUT THE FRONT DOOR WAS BECAUSE THERE WAS TOO MUCH BLOOD. WHAT DID STEVE CLARE TELL YOU? HE SEES A PERSON DUCK DOWN. IS IT CONSISTENT AND WHOLLY CONSISTENT WITH HIS TESTIMONY THAT THAT PERSON WOULD HAVE FLED? HE TOLD YOU THAT HE DROVE IN AND DROVE AROUND. HOW MANY DIFFERENT PLACES DOES WILLIAM ARTHUR KELLY HAVE TO LEAVE THAT PLACE? THERE'S THE BACK DOOR. ONE BOLT. THERE WAS NO BLOOD BACK THERE. BECAUSE IF YOU GO OUT THE BACK DOOR, YOU ARE GOING EXACTLY WHERE STEVE CLARE WAS. THE FRONT DOOR. I'M NOT GOING OUT THE WAY I WENT IN. WELL, THAT MAKES A LOT OF SENSE.

LADIES AND GENTLEMEN, HE OBVIOUSLY DIDN'T HAVE A PROBLEM WALKING THROUGH THE BLOOD. HIS FOOTPRINTS ARE THROUGHOUT IT, BUT SUDDENLY HE'S OVERCOME WITH THAT AND DECIDES THAT I DON'T WANT TO WALK THROUGH THAT. AND EVEN IF HE DIDN'T WANT TO DO THAT, THIS IS A COUNTER. WHY NOT JUST HOP OVER THE COUNTER? NO, I'M GOING TO SQUEEZE THROUGH

THE DRIVE-THRU WINDOW WHICH IS ON THE OPPOSITE SIDE WHERE STEVE CLARE'S POLICE VEHICLE IS ON THIS SIDE AND RUN AND CONTINUE RUNNING UNTIL I GET TO LOWELL, MASSACHUSETTS, WHERE THE POLICE FIND HIM. RIGHT THERE. HE EVEN GOES SO [1607] FAR TO TELL YOU THAT HE WAS ADMITTING TO WHAT HE WAS WEARING AT THE CRIME SCENE.

WELL, LADIES AND GENTLEMEN, I DON'T KNOW IF YOU REMEMBER THE TESTIMONY ABOUT THE MISSING PERSON'S REPORT. THERE WAS ALSO A TAN SHIRT. YOU MAY HEAR ABOUT HOW THERE WASN'T ENOUGH BLOOD ON THIS SHIRT. THAT'S NOT IN THERE. WHERE IS THAT? PROBABLY THE SAME PLACE THOSE GLOVES ARE. ONE GLOVE WITHOUT THE TIP.

LADIES AND GENTLEMEN, THE SCENARIO IS SIMPLE. WILLIAM ARTHUR KELLY FORCED SHIRLEY SHEALY AT KNIFE POINT TO GO BACK INTO THAT KENTUCKY FRIED CHICKEN. WILLIAM ARTHUR KELLY FORCED SHIRLEY SHEALY, THE ONLY PERSON WHO COULD HAVE OPENED THAT SAFE AT THAT POINT, TO TAKE THE MONEY FROM THEM. WILLIAM ARTHUR KELLY DUCT TAPED SHIRLEY SHEALY WITH HER HANDS BEHIND HER BACK. WILLIAM ARTHUR KELLY PUT HER IN THAT CHAIR. WILLIAM ARTHUR KELLY STABBED HER EXECUTION STYLE. SHE WAS DEFENSELESS. WILLIAM ARTHUR KELLY TRIED TO TAPE HER TO THAT CHAIR. SHIRLEY SHEALY TRIED TO RUN FOR HER LIFE. SHIRLEY SHEALY RAN FIGHTING FOR HER LIFE TO GET OUT. WILLIAM ARTHUR KELLY WASN'T GOING TO LET IT

HAPPEN. WILLIAM ARTHUR KELLY AS SHE GASPS FOR AIR, WITH HER HANDS DUCT-TAPED BEHIND HER BACK, REPEATEDLY, BRUTALLY STABBED HER, CUT HER, SLIT HER THROAT, PUT A HATCHET-LIKE WOUND IN HER HEAD, CUT HER UP LIKE A PIECE OF MEAT AND LEFT HER THERE TO DIE. HE EVEN TRIED TO DRAG HER [1608] BACK INTO THE KITCHEN AREA TO HIDE HIS HANDY WORK.

WILLIAM ARTHUR KELLY, LADIES AND GENTLEMEN, WAS CAUGHT IN THE ACT. WILLIAM ARTHUR KELLY DID NOT HAVE TIME TO COLLECT ALL OF THE MONEY. WILLIAM ARTHUR KELLY FLED OUT OF THE DRIVE-THRU WINDOW TO ESCAPE STEVE CLARE CATCHING HIM. WILLIAM ARTHUR KELLY FLED ON FOOT OUT THE BACK TO WHERE HE HAD PARKED HIS CAR BEHIND THE KENTUCKY FRIED CHICKEN IN AN ADJACENT LOT. WILLIAM ARTHUR KELLY DISCARDED THE GLOVES THAT HE HAD AND THE SHIRT THAT HE HAD AND WENT UP TO LOWELL, MASSACHUSETTS, WHERE HE WAS APPREHENDED BY THE POLICE.

LADIES AND GENTLEMEN, THIS WAS DONE FOR ONE SIMPLE REASON. YOU HEARD SOLICITOR MYERS DISCUSS IT IN HIS OPENING STATEMENT. MONEY. WILLIAM ARTHUR KELLY PLACED ABOUT 140 DOLLARS OVER THE LIFE OF SHIRLEY SHEALY.

LADIES AND GENTLEMEN, HE TRIED TO RUN FROM THAT. LADIES AND GENTLEMEN, THE EVIDENCE WON'T LET HIM DO THAT. YOU ARE HERE IN A VERY – THE MOST IMPORTANT ROLE THAT ANYONE IN THIS COURTROOM HAS.

IT IS YOUR ROLE TO TAKE THE EVIDENCE AND TO LISTEN TO THE LAW AS IT'S CHARGED BY JUDGE CLARY AND IT IS YOUR JOB TO PUT THEM TOGETHER AND TO SPEAK THE TRUTH. DECIDE WHAT HAPPENED ON JANUARY THE 5TH, 6TH, 7TH, 8TH, 9TH, 10TH OF 1996. THAT IS YOUR ROLE. ONCE YOU DO THAT, YOU APPLY THE LAW.

YOU USED YOUR COMMON SENSE. AND I SUBMIT IT IS CLEAR THAT THE RUNNING WILL STOP. [1609] WILLIAM ARTHUR KELLY WILL BE HELD ACCOUNTABLE FOR THE ACTS THAT HE DID TO SHIRLEY SHEALY THAT DAY, THAT NIGHT IN ENDING HER LIFE OVER A LITTLE BIT OF MONEY.

LADIES AND GENTLEMEN, I ASK YOU TO GO BACK IN AT THE CONCLUSION OF THE DEFENSE ARGUMENT AND THE JUDGE'S CHARGE TO DELIBERATE AND TO SPEAK THE TRUTH. THE TRUTH BEING THAT WILLIAM ARTHUR KELLY IS GUILTY OF MURDER, ARMED ROBBERY, KIDNAPPING AND THE USE OF A KNIFE DURING THE COMMISSION OF A VIOLENT CRIME.

[1651] **PRELIMINARY INSTRUCTIONS TO THE JURY – SENTENCING PHASE BEGINS**

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LADIES AND GENTLEMEN OF THE JURY, THE DEFENDANT, WILLIAM ARTHUR KELLY, WAS CONVICTED ON SEPTEMBER 17, 1998, OF THE OFFENSE OF MURDER AND THE OFFENSES OF KIDNAPPING,

ARMED ROBBERY AND POSSESSION OR DISPLAY OF A KNIFE DURING THE COMMISSION OF A VIOLENT CRIME.

IT THEREFORE BECOMES NECESSARY FOR US TO HOLD THIS ADDITIONAL PROCEEDING WHICH WILL DETERMINE THE PUNISHMENT THAT THE COURT IS TO IMPOSE UPON THE DEFENDANT.

SECTION 16-3-20 OF THE CODE, SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED, PROVIDES IN PART AS FOLLOWS: A [1652] PERSON WHO IS CONVICTED OF OR PLEADS GUILTY TO MURDER, MUST BE PUNISHED BY DEATH OR IMPRISONMENT FOR LIFE. THAT SECTION, AS FURTHER AMENDED, ALSO PROVIDES IN PART: UPON CONVICTION OF A DEFENDANT OF MURDER, THE COURT SHALL CONDUCT A SEPARATE SENTENCING PROCEEDING TO DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH OR LIFE IMPRISONMENT.

SO OUR PURPOSE IN CONDUCTING THE PROCEEDING IN WHICH WE ARE NOW ENGAGED IS TO DETERMINE WHETHER THE DEFENDANT, WILLIAM ARTHUR KELLY, SHOULD BE SENTENCED BY THE COURT TO DEATH OR TO LIFE IMPRISONMENT.

WITH RESPECT TO YOUR PARTICULAR ROLE IN THIS PROCEEDING, YOU WILL BE ASKED TO RECOMMEND TO THE COURT WHETHER IT SHOULD SENTENCE THE DEFENDANT, WILLIAM ARTHUR KELLY, TO DEATH OR TO LIFE IMPRISONMENT.

DURING THE SENTENCING PROCEEDING, THE STATE AND THE DEFENDANT WILL HAVE AN

OPPORTUNITY TO INTRODUCE ADDITIONAL EVIDENCE IN AGGRAVATION, EXTENUATION OR MITIGATION AND BOTH SIDES WILL HAVE AN OPPORTUNITY TO PRESENT ARGUMENTS FOR AND AGAINST THE DEATH PENALTY. SHOULD YOU RECOMMEND A SENTENCE OF LIFE IMPRISONMENT OR SHOULD YOU RECOMMEND A SENTENCE OF DEATH, THAT IS THE ONLY ISSUE INVOLVED HERE.

AFTER THE LAST ARGUMENT HAS BEEN MADE TO YOU CONCERNING THE PUNISHMENT THAT I SHOULD IMPOSE UPON THE DEFENDANT, THE COURT WILL THEN GIVE YOU CERTAIN INSTRUCTIONS AND YOU WILL THEN RETIRE TO DETERMINE WHETHER A DEATH SENTENCE OR A LIFE SENTENCE IS TO BE RECOMMENDED.

WE WILL NOW BEGIN THIS PHASE.

SOLICITOR.

[1653] **OPENING STATEMENTS BY THE SOLICITOR**

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THE SOLICITOR: MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, AS JUDGE CLARY HAS TOLD YOU, THE GUILT PHASE, THE FIRST PHASE IS OVER WITH. AND NOW WE GET INTO THAT SECOND PHRASE [sic], THE SENTENCING PHASE, TO IMPOSE THE APPROPRIATE SENTENCE THAT FITS THE CRIME. YOU HAVE DONE YOUR

DUTY IN THE FIRST PART. YOU FOUND THE DEFENDANT GUILTY OF MURDER BEYOND A REASONABLE DOUBT. AS A MATTER OF FACT, BEYOND ALL DOUBT. WE DON'T HAVE TO GO BACK THERE. HE NO LONGER SITS OVER THERE WITH THAT CLOAK OF INNOCENCE WRAPPED AROUND HIM. HE'S STRIPPED NAKED AS A COLD-BLOODED CONNIVING, CALCULATED MURDERER. AND I HOPE YOU NEVER IN YOUR LIVES AGAIN HAVE TO EXPERIENCE WHAT YOU ARE EXPERIENCING RIGHT NOW. BEING SOME THIRTY FEET AWAY FROM SUCH A PERSON. MURDERER.

WE'VE GOT ONE MORE DUTY TO DO. WE'VE GOT ONE MORE THING TO DECIDE, THE SENTENCE. AND THERE'S ONLY ONE SENTENCE FOR THE BRUTAL, BLOODY, BUTCHERING MURDER HE COMMITTED. THE DEATH PENALTY. IT'S WARRANTED. IT'S THE APPROPRIATE SENTENCE. IT'S THE PUNISHMENT THAT FITS THE CRIME.

[1654] NOW, IN THIS PHASE, WE BRING THOSE TERMS INTO PLAY THAT YOU WERE ASKED ABOUT WHEN YOU SAT IN THIS CHAIR UP HERE MONDAY AND TUESDAY. AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES. AND IN THIS PHASE, THE LAW SAYS THE STATE MUST PROVE CERTAIN STATUTORY AGGRAVATING CIRCUMSTANCES. AND THERE COULD BE MITIGATING EVIDENCE FAVORABLE TO THE DEFENDANT SHOWN UNTO YOU. AND THIS GOES TO THE CHARACTER AND CHARACTERISTICS OF MURDERER WILLIAM ARTHUR KELLY. THIS GOES TO THE CIRCUMSTANCES SURROUNDING THE CRIME. AND YOU ARE GOING TO HEAR

SOME MORE ABOUT THAT. IT'S GOING TO BE, FOLKS, EVEN MORE GRUESOME THAN WHAT YOU HEARD WEDNESDAY AND THURSDAY. IT'S GOING TO BE UGLIER THAN WHAT YOU'VE HEARD FOR THE LAST TWO DAYS.

IN THE LAW BOOKS UP THERE BY THE JUDGE'S DESK THAT HE HAS, OUR GENERAL ASSEMBLY HAS WRITTEN INTO THE LAWS A FEW OTHER CIRCUMSTANCES, CRIMES OR ACTS THAT HAVE TO SURROUND A MURDER. THEY ARE CALLED STATUTORY BECAUSE THEY ARE IN THE STATUTES. STATUTORY AGGRAVATING CIRCUMSTANCES. AND IT'S OUR JOB TO PROVE TO YOU AT LEAST ONE OUT OF THOSE LAW BOOKS THAT SURROUNDED THESE CRIMES AT THE K.F.C. ON FRIDAY, JANUARY THE 5TH. ALL WE HAVE TO DO IS PROVE ONE FOR YOUR CONSIDERATION BEYOND A REASONABLE DOUBT FOR YOU TO IMPOSE THE DEATH PENALTY.

BUT YOU KNOW WHAT? WE ARE GOING TO SUBMIT FIVE TO YOU. FIVE. SURROUNDING THE MURDER, THERE WAS A [1655] STATUTORY AGGRAVATING CIRCUMSTANCE OR CRIME OF KIDNAPPING. SURROUNDING THE MURDER, THERE WAS A STATUTORY AGGRAVATING CIRCUMSTANCE OF ARMED ROBBERY. SURROUNDING THE MURDER, THERE WAS A STATUTORY AGGRAVATING CIRCUMSTANCE OF LARCENY WITH A DEADLY WEAPON. SURROUNDING THE MURDER WAS THE STATUTORY AGGRAVATING CIRCUMSTANCE OF BURGLARY, GOING INTO A PLACE WITHOUT LAWFUL CONSENT WITH THE INTENT TO COMMIT A CRIME. CAN BE IN THE NIGHTTIME, CAN BE WHEN SOMEBODY GOES

IN THERE ARMED WITH A KNIFE, A DEADLY WEAPON, IF SOMEBODY CAUSES PHYSICAL INJURY TO ANOTHER IN A BUILDING, IF THEY DISPLAY A KNIFE OR DEADLY WEAPON. ALL OF THESE THINGS. AND THEN FIVE AND PROBABLY THE WORST ONE OF ALL, SURROUNDING THE MURDER, IT WASN'T JUST A MURDER. IT WAS ACCOMPLISHED WITH THE STATUTORY AGGRAVATING CIRCUMSTANCE OF PHYSICAL TORTURE. PHYSICAL TORTURE. WE ARE GOING TO PROVE THAT TO YOUR SATISFACTION. WE ONLY HAVE TO PROVE ONE. YOU CAN FIND ONE. YOU CAN FIND TWO. YOU CAN FIND THREE. YOU CAN FIND FOUR. YOU CAN FIND FIVE. BUT IF YOU FIND JUST ONE ALONE, YOU MAY IMPOSE THE DEATH PENALTY AND WE HAVE TO PROVE THAT TO YOU BEYOND A REASONABLE DOUBT AND I WELCOME THAT OPPORTUNITY.

AND THE JUDGE IS GOING TO TELL YOU THIS. EVEN WITH ALL OF THAT, EVEN WITH ALL OF THOSE AGGRAVATING CIRCUMSTANCES, YOU CAN RETURN A SENTENCE OF LIFE FOR ANY REASON OR NO REASON AT ALL. IT'S UP TO YOU.

[1656] YOU KNOW IT'S APPROPRIATE – IT'S IRONIC AND APPROPRIATE THAT WE ARE STARTING COURT HERE ON A FRIDAY NIGHT. YOU REMEMBER WHAT DAY JANUARY THE 5TH WAS. YOU REMEMBER WHAT NIGHT IT WAS THAT SHIRLEY SHEALY WAS BUTCHERED? ABOUT 6:15 OR 6:20 THAT NIGHT, HE ALREADY HAD HIS PLANS IN ACTION. THE SAME FRIDAY NIGHT. AS SHIRLEY SHEALY WAS GOING ABOUT HER BUSINESS EARNING A LIVING, HE ALREADY HAD HIS KNIFE. HE ALREADY HAD

HIS DUCT TAPE. HE ALREADY HAD HIS GLOVES AND HE ALREADY HAD HIS BUTCHERING PLAN. ALL HE HAD TO DO THEN WAS JUST TO CARRY IT OUT. PUT HIS PLANS INTO ACTION. AND LATER ON HE DID. HE HAD HIS CAR BACK OVER THERE ON HARTLEY STREET WAITING. IN HER CAR, – BRINGING HER BACK. GOING INSIDE THAT BUILDING WITHOUT LAWFUL AUTHORITY AND WITHOUT VALID CONSENT. THIS LADY WAS OVER SIX MONTHS PREGNANT, FOLKS, AND HE KNEW IT. HE TOLD YOU SO IN HIS CONFESSION. THAT'S EVEN MORE AGGRAVATED. OVER SIX MONTHS PREGNANT. SHE HAD ALREADY HAD ONE BABY. AND THAT BABY WAS BORN PREMATURE. THAT FIRST BABY WAS BORN WHEN SHE WAS ABOUT – JUST ABOUT SEVEN MONTHS PREGNANT AND NOW SHE'S SIX – OVER SIX MONTHS PREGNANT AGAIN. THE DEFENDANT KNOWING IT AND HE CARRIES OUT THIS PLAN.

THAT'S AGGRAVATION WITHIN ITSELF. AND I WANT YOU TO THINK WHEN YOU LEAVE HERE TODAY – THE JUDGE SAYS HE WANTS TO CLOSE DOWN ABOUT 10 O'CLOCK –

MR. KIRKLAND: OBJECTION, YOUR HONOR.

[1657] WE WANT TO RENEW OUR MOTION ON THE SAME GROUNDS REGARDING THAT ISSUE WE DISCUSSED.

THE COURT: THE OBJECTION IS NOTED. IT'S OVERRULED.

THE SOLICITOR: WHEN WE LEAVE HERE TONIGHT AROUND 10 O'CLOCK, THAT FRIDAY NIGHT, SHIRLEY SHEALY AND HER BABY HAD LESS THAN AN HOUR TO LIVE AT HIS HANDS.

THERE'S ONLY ONE SENTENCE FOR THIS CASE. THERE'S ONLY ONE SENTENCE THAT'S WARRANTED. THERE'S ONLY ONE SENTENCE THAT'S APPROPRIATE. THERE'S ONLY ONE SENTENCE THAT FITS THE CRIME.

WE HAVE ASKED FOR THE DEATH PENALTY. WE ARE GOING TO BE VIGOROUSLY SEEKING THE DEATH PENALTY AND, FOLKS, WE EXPECT THE DEATH PENALTY.

[1661] **CHARLES JORDAN, III – DIRECT BY MR. CHASE**

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CHARLES JORDAN, III,

FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME, PLEASE.

THE WITNESS: MY NAME IS CHARLES P. JORDAN, III, J-O-R-D-A-N.

DIRECT EXAMINATION

BY MR. CHASE:

Q OFFICER JORDAN, I'M GOING TO ASK YOU TO SPEAK UP. [1662] MAKE SURE EVERYBODY CAN HEAR YOU, OKAY?

A YES, SIR.

Q OFFICER JORDAN, WHERE ARE YOU EMPLOYED?

A LEXINGTON COUNTY DETENTION CENTER.

Q RIGHT OVER HERE ON GIBSON ROAD?

A YES, SIR.

Q WHAT ARE YOUR DUTIES OVER THERE?

A BASICALLY, IT'S SECURITY AND WELFARE OF THE INMATES.

Q HOW LONG HAVE YOU BEEN WORKING OVER THERE?

A OCTOBER WILL BE TWO YEARS.

[1663] Q WHERE – WHERE ARE YOU SPENDING MOST OF YOUR TIME AS A CORRECTIONAL OFFICER?

A BASICALLY, I SPEND MOST OF MY TIME WORKING THE FLOORS.

Q WHEN YOU SAY WORKING THE FLOORS, WELL, EXPLAIN TO THE JURY WHAT THAT MEANS?

A BASICALLY, THERE ARE THREE FLOORS AT THE DETENTION CENTER. EACH FLOOR, BASICALLY

HOUSES ABOUT 102 INMATES. OUR MAIN JOB TO DO WHILE WE WORK THERE, OUR TWELVE-HOUR DAY IS TO GO IN AND MAKE SURE ALL OF THE ROOMS ARE THE WAY THEY ARE SUPPOSED TO BE. AIN'T NOBODY TRYING TO ESCAPE. THAT NO OTHER INMATES ARE TRYING TO HURT THEMSELVES OR ANOTHER INMATE –

MS. FULLWOOD: YOUR HONOR, WE ARE HAVING SOME PROBLEMS HEARING THE WITNESS.

THE COURT: YES, SIR. IF YOU WOULD, PLEASE SPEAK UP. YOU DON'T NEED TO PULL THE MICROPHONE ANY CLOSER TO YOU. YOU JUST NEED TO SPEAK UP A LITTLE BIT BECAUSE IF YOU PULL THAT MICROPHONE TOO CLOSE TO YOU, IT WILL START BARKING AT YOU,

THE WITNESS: YES, SIR.

MR. CHASE: HOW WOULD YOU GO ABOUT DOING THAT? DO YOU ACTUALLY GO ONTO THE FLOORS?

A YES, SIR. WE ARE SUPPOSED TO MAKE A ROUND EVERY 10 OR 15 MINUTES.

[1664] Q SO ARE YOU ACTUALLY IN, AROUND AND AMONG THE INMATES AT THE LEXINGTON DETENTION CENTER?

A YES, SIR.

Q YOU SAID THEY ARE ON FLOORS?

A YES, SIR.

Q HOW ARE THOSE FLOORS SET UP?

A THERE ARE THREE FLOORS AND YOU HAVE THREE WINGS TO A FLOOR.

Q AND APPROXIMATELY, HOW MANY CELLS WOULD BE ON EACH ONE OF THOSE WINGS, DO YOU KNOW?

A EACH WING – WELL, YOU HAVE A, B, AND A C WING. YOUR B WING HAS TEN CELLS; YOUR A AND YOUR C HAVE TWELVE.

Q NOW, WOULD YOU BE – WOULD YOU ALWAYS BE ON ONE PARTICULAR FLOOR OR DO YOU FLOAT AROUND DEPENDING ON WHICH DAY YOU ARE AT WORK?

A NO, SIR. YOU ROTATE FROM FLOOR TO THE ANNEX TO BOOKING.

Q AND WHAT IS ANNEX? WHAT'S THE ANNEX?

A THE ANNEX IS WHERE YOU KEEP YOUR MINIMUM SECURITY INMATES. BASICALLY, I MEAN, LIKE YOUR FRAUDULENT CHECKS. I MEAN FAMILY COURT, STUFF LIKE THAT.

Q AND WHAT'S BOOKING?

A BOOKING IS WHERE THEY BRING INMATES IN AND WHERE YOU DISCHARGE THEM.

[1665] Q AND YOU WOULD ROTATE THROUGH ALL OF THOSE PLACES –

A YES, SIR.

Q – AS A CORRECTIONAL OFFICER?

A YES, SIR.

Q NOW, YOU TALKED ABOUT WHEN YOU WOULD BE ON THE FLOORS, THAT YOU WOULD ACTUALLY BE CHECKING ON THE SAFETY AND WELFARE OF THE INMATES. HOW DO YOU GO ABOUT DOING THAT?

A BASICALLY, WE – WHEN WE PASS OUT THE FOOD TRAYS AND STUFF IN THE MORNING, WE'LL CHECK THE CELLS THEN AND THEN AFTER WE PASS OUT THE TRAYS AND PICK THEM UP, WE'LL DO A CLEAN-UP. BASICALLY, CLEAN-UPS ARE FOR THE INMATES TO CLEAN THEIR CELLS AND ALSO FOR YOU TO GIVE YOUR OPPORTUNITY TO GO IN AND CHECK OUT THE CELLS.

Q SO WHEN YOU SAY, YOU CHECK OUT THE CELLS, WHAT ARE YOU DOING ON A DAILY BASIS?

A BASICALLY, YOU WANT TO INSPECT FOR ANYTHING OUT OF THE ORDINARY. YOU WANT TO SEE IF ANY OF THE FAUCETS ARE MISSING. YOU WANT TO CHECK AND SEE IF THERE'S ANY NEW – WHERE THEY ARE TRYING TO DIG OUT, IF THERE ARE ANY NEW HOLES OR ANYTHING LIKE THAT.

Q NOW, AS OPPOSED TO THAT VISUAL CHECK THAT YOU ARE DOING ON A DAILY BASIS, WHAT'S A SHAKEDOWN?

A A SHAKEDOWN CONSISTS OF WHENEVER YOU HAVE A COUPLE OF OFFICERS THAT GOES UP ONTO THE FLOORS AND THEY'LL ACTUALLY [1666] GO IN AND MAKE SURE THE INMATES AIN'T GOT NO CONTRABAND. CONTRABAND CONSISTS OF ANYTHING THAT'S EXTRA, MORE THAN TWO

SHEETS, TWO BLANKETS, EXTRA JUMPSUITS, TOO MANY PENS, TOO MANY PENCILS, AND TOO MUCH MEDICATION OR ANYTHING TO THAT EFFECT.

Q IN OTHER WORDS, YOU'VE GOT CERTAIN RULES THAT ARE SET UP OVER AT THE DETENTION CENTER?

A YES, SIR.

Q ABOUT HOW THEY CAN – HOW INMATES CAN ACT AND WHAT THEY CAN HAVE?

A YES, SIR.

Q NOW, IN YOUR TWO YEARS THAT YOU'VE BEEN OVER THERE WORKING AS A CORRECTIONAL OFFICER, HAVE YOU COME IN CONTACT WITH AN INMATE BY THE NAME OF WILLIAM KELLY?

A YES, SIR. HE'S ACTUALLY THE FIRST INMATE I ACTUALLY HAD TO WRITE UP WITHIN MY FIRST MONTH THERE.

Q WHAT HAPPENED IN THAT SITUATION?

A BASICALLY, I GUESS, HE DIDN'T LIKE THE WAY I WAS DOING MY JOB. SO WHEN I CAME AND OPENED UP HIS CELL DOOR, HE CALLED ME A FUCKING DUMB ASS. AND I TURNED BACK AROUND AND ASKED HIM TO STEP BACK INTO HIS CELL. HE REFUSED. I ASKED HIM SEVERAL TIMES AFTER THAT. HE SAID THE ONLY WAY THAT I'M GOING TO GET HIM BACK IN THAT CELL IF I CALL FOR BACKUP. SO I CALLED FOR BACKUP AND THEY ESCORTED HIM BACK INTO HIS CELL.

[1667] Q OFFICER JORDAN, FROM THAT TIME ON, DID YOU BEGIN TO KEEP AN EYE ON WILLIAM ARTHUR KELLY?

A YES, SIR. ANY TIME THAT I HAVE A DEALING WITH ANY INMATE, ANY TIME I HAVE TO WRITE THEM UP OR ANYTIME I HAVE ANY DISCREPANCIES WITH THEM, USUALLY I KEEP AN EYE ON THEM. BUT NOT TOO LONG AFTER THAT WE HAD A – WELL, ACTUALLY, A LONG TIME AFTER THAT. ABOUT – PROBABLY ABOUT FOUR OR FIVE MONTHS AGO –

Q WELL, LET ME ASK YOU THIS, WERE YOU WORKING ON AUGUST THE 19TH –

A YES, SIR.

Q – OF THIS YEAR –

MR. KIRKLAND: OBJECTION.

YOUR HONOR, WE HAVE A MATTER OF LAW DEALING WITH THIS ISSUE.

THE COURT: ALL RIGHT.

LADIES AND GENTLEMEN OF THE JURY, I HAVE A MATTER OF LAW TO TAKE UP WITH THE LAWYERS. I'M GOING TO SEND YOU TO THE JURY ROOM WHILE I DISCUSS THAT MATTER WITH THEM.

ONCE AGAIN, PLEASE DO NOT DISCUSS THIS CASE WHILE YOU ARE IN THE JURY ROOM. YOU MAY BE EXCUSED.

(JURY OUT.)

THE COURT: ALL RIGHT, MR. KIRKLAND.

MR. KIRKLAND: THANK YOU, YOUR HONOR.

AT THIS TIME, YOUR HONOR, WE ARE OBJECTING TO AN [1668] INCIDENT, I BELIEVE, THEY ARE GOING TO SAY OCCURRED BACK ON 8/19/1998, WHICH IS AN ATTEMPTED ESCAPE ATTEMPT.

THE FACTS SURROUNDING THIS INCIDENT IS YOU HAD THREE INMATES IN ONE CELL. ALL THREE OF THEM HAVE BEEN CHARGED WITH THE ESCAPE ATTEMPT AND DESTRUCTION OF PROPERTY.

YOUR HONOR, WE BELIEVE THAT RULE 404 (B) AS WELL AS *LYLE* AND THE OTHER LINES OF CASES APPLY HERE AS FAR AS PRIOR BAD ACTS AND WRONGS.

YOUR HONOR, THERE'S NO WAY THEY CAN PROVE BY CLEAR AND CONVINCING EVIDENCE THAT BILLY KELLY WAS THE ACTOR IN THIS PARTICULAR MATTER. THEY CHARGED THREE INDIVIDUALS. HE HAPPENED TO BE IN THAT CELL. IN FACT, MY UNDERSTANDING IS THAT WHERE THIS MORTAR WAS AROUND THIS PARTICULAR BLOCK WAS ANOTHER INMATE'S CELL. I BELIEVE IT WAS RIGHT ABOVE THE TOP BUNK.

SO I DON'T SEE HOW THEY CAN EVEN –

THE COURT: YOU SAY IT'S ANOTHER INMATE'S CELL OR ARE YOU TELLING ME THERE WERE THREE PEOPLE IN THERE?

MR. KIRKLAND: NO. IT'S THREE INMATES IN THERE, I'M SORRY. HIS BED, ANOTHER INMATE'S BED, THE TOP BUNK.

THE COURT: ALL RIGHT, MR. CHASE.

MR. CHASE: YOUR HONOR, THE SITUATION WE ARE DEALING WITH HERE IS THREE INMATES IN AN EIGHT BY TEN CELL WHEREIN THERE HAS BEEN SUBSTANTIAL REMOVING OF THE MORTAR [1669] AROUND A CINDER BLOCK THAT IS AN EIGHT BY TEN CELL LITERALLY. I MEAN, YOU CAN BASICALLY SPREAD YOUR ARMS AND BE – AND TOUCH BOTH WALLS. THERE'S NO QUESTION ABOUT THE FACT – NOW, THEY CAN ARGUE ALL DAY LONG THAT HE WASN'T INVOLVED, BUT HE DARN SURE KNEW ABOUT IT. THAT MAKES HIM A CO-CONSPIRATOR OR AT A MINIMUM, A CO-CONSPIRATOR. IT DEFINITELY GOES TO HIS CHARACTER. SOMETHING LIKE THAT CAN'T GO ON IN A CELL THAT SMALL. SO DEFINITELY WOULD BE ADMISSIBLE IN THIS PHASE OF THE TRIAL.

MR. KIRKLAND: JUDGE, UNDER *STATE VERSUS CUTRO*, WE HAD TWO BABIES THAT DIED. WE HAD A HUSBAND AND A WIFE AND THAT CASE, AS YOU WELL KNOW, WAS JUST DECIDED BY OUR SUPREME COURT AND JUSTICE MOORE DISCUSSES SPECIFICALLY ABOUT THE ACTOR AND TALKS ABOUT THE CLEAR AND CONVINCING STANDARD.

THE COURT: WELL, MR. KIRKLAND, I WANT YOU TO UNDERSTAND THAT WE ARE A LITTLE BIT DIFFERENT THAN YOUR *CUTRO* CASE. WE'RE IN A

DEATH PENALTY. WE'RE IN THE SENTENCING PHASE –

MR. KIRKLAND: I UNDERSTAND.

THE COURT: – SO – AND I'VE SEEN A NUMBER OF OPINIONS THAT JUSTICE MOORE HAS WRITTEN IN THIS REGARD IN REGARDS TO EVIDENCE THAT CAN BE PRESENTED IN THE SENTENCING PHASE. SO YOU CAN TALK ABOUT *CUTRO* ALL YOU WANT TO, BUT LET'S MAKE IT RELEVANT TO WHAT WE'RE HERE ABOUT.

[1670] MR. KIRKLAND: YOUR HONOR, I –

THE COURT: I JUST READ THAT CASE.

MR. KIRKLAND: I UNDERSTAND THAT, BUT, YOUR HONOR, I THINK WHAT WE ARE TALKING ABOUT IS HERE THEY STILL HAVE TO HAVE THE THRESHOLD TO PROVE THAT HE IS THE ACTOR IN THIS MATTER. WE'VE GOT THREE PEOPLE CHARGED AND WHAT THEY'RE TRYING TO DO IS TELL THIS JURY THAT HE'S ESSENTIALLY THE ONE THAT DID IT.

BEG THE COURT'S INDULGENCE.

JUDGE, I MEAN, THEY ARE TRYING TO PUT THIS IN AS EVIDENCE OF AGGRAVATION WHICH, OF COURSE, DOES HAVE TO DO WITH THIS PARTICULAR PHASE OF THE TRIAL AND WE FEEL THAT EVEN BY ALLOWING THAT IN THERE IS A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS. WE STILL ALSO REFER TO 404(B) AND THE *LYLE* LINE OF CASES IN TERMS OF BURDEN OF PROOF ON THE STATE.

THE COURT: ANYTHING ELSE, MR. CHASE?

MR. CHASE: NOTHING AT THIS TIME, YOUR HONOR.

THE COURT: WELL, I UNDERSTAND THE ARGUMENT THAT YOU MAKE, MR. KIRKLAND, BUT I THINK THAT WHEN WE GET INTO THE SENTENCING PHASE OF A TRIAL, THERE ARE TWO OR THREE THINGS THAT COME TO MIND HERE TO ME.

NUMBER ONE, I UNDERSTAND THAT HE WAS ONE OF THREE INDIVIDUALS IN THAT CELL. CERTAINLY, HE HAS SOME – NOT ONLY DOES HE HAVE SOME RIGHTS, BUT HE ALSO HAS SOME [1671] RESPONSIBILITIES BECAUSE IN AN EIGHT BY TEN CELL, HE'S GOING TO KNOW WHAT'S GOING ON. IT WOULD BE HIGHLY UNLIKELY THAT ANYTHING'S GOING TO GO ON IN THAT CELL THAT ANYONE DOESN'T KNOW THAT'S GOING ON.

NUMBER TWO, I THINK THAT THIS GOES TO CHARACTER. AND WE ARE TALKING ABOUT HIS CHARACTERISTICS AND AS A RESULT OF THAT, I'M GOING TO DENY YOUR MOTION. I THINK THAT IT'S PROPER EVIDENCE TO BE PRESENTED IN THE SENTENCING PHASE.

THE MOTION IS DENIED.

* * *

Q OFFICER JORDAN, I ASKED YOU BEFORE, WERE YOU WORKING ON THE DAY OF AUGUST THE 19TH, 1998?

A YES, SIR.

Q DO YOU RECALL WHAT FLOOR YOU WERE WORKING ON?

A I WAS WORKING THIRD FLOOR.

Q NOW, DURING THE COURSE OF YOUR DUTIES, YOU SAID THAT YOU WOULD GO THROUGH AND YOU WOULD CHECK THE ROOMS?

[1672] A YES, SIR.

Q DID YOU FIND ANYTHING IN PARTICULAR ON THAT DAY IN CELL 3-A-7?

A YES, SIR. WHENEVER I – WHENEVER I FIRST WALKED IN TO PASS OUT THE TRAYS THAT MORNING, IN 3-A-7, ONE OF THE BLOCKS RIGHT OVER THE TOP BUNK, IT LOOKED LIKE IT HAD BEEN INKED AROUND WITH A PEN, AROUND THE MORTAR JOINT.

Q LET ME ASK YOU THIS. HOW MANY INMATES WERE IN THAT CELL?

A THREE.

Q WAS WILLIAM ARTHUR KELLY ONE OF THOSE INMATES?

A YES, SIR.

Q AND YOU SAID THAT ONE OF THE – ONE OF THE WHAT LOOKED LIKE IT HAD BEEN INKED AROUND?

A THE MORTAR JOINTS.

Q OKAY. WHERE WOULD THE MORTAR JOINTS BE?

A ACTUALLY AROUND THE BRICK.

Q IF YOU COULD, DESCRIBE FOR THE JURY EXACTLY WHAT THE INSIDE OF A CELL WOULD LOOK LIKE AND WHAT IT'S MADE UP OF?

A OKAY. YOU HAVE AN EIGHT BY TEN CELL. WHEN YOU FIRST WALK IN, YOUR TOILET IS GOING TO BE RIGHT TO YOUR RIGHT. THEN YOU'RE GOING TO HAVE A SET OF BUNK BEDS, STEEL BUNK BEDS. YOU ARE GOING TO HAVE A SMALL RECTANGULAR WINDOW AND YOU'RE GOING TO HAVE AN INMATE THAT'S SLEEPING ON THE FLOOR. AND THAT'S BASICALLY WHAT THE ROOM IS MADE UP OF.

[1673] Q AND WHAT ARE THE WALLS MADE OF?

A CEMENT AND CINDER BLOCK.

Q SO THE MORTAR THAT YOU'VE DESCRIBED, THAT'S AROUND THOSE CINDER BLOCKS?

A YES, SIR.

Q NOW, YOU SAID THERE WAS ONE THAT WAS – THAT APPEARED THAT WASN'T – IT WAS OUT OF THE ORDINARY CONDITION?

A WELL, YEAH. IT LOOKED KIND OF OUT OF THE ORDINARY, BUT IF YOU FIRST WALK UP THERE, IT'S NOT TOO OUT OF THE ORDINARY BECAUSE THE INMATES, THEY DRAW ALL OVER THE WALLS ANYWAY. AND WHENEVER I SEEN THAT, I WASN'T TOO WORRIED ABOUT IT AT THE TIME, BUT THEN AS THE DAY PROGRESSED, I DECIDED I'LL GO BACK AND

INVESTIGATE A LITTLE BIT MORE CONSIDERING WHO WAS THE INMATES THAT WAS IN THE CELL.

[1674] OFFICER JORDAN, YOU INDICATED THAT YOU SAW SOMETHING IN THE CELL THAT KIND OF THREW UP A RED FLAG FOR YOU. LATER IN THE DAY, DID YOU GO BACK AND FOLLOW-UP ON YOUR CONCERN FROM WHAT YOU HAD SEEN? THE WITNESS: YES, SIR. LATER UP IN THE AFTERNOON, PROBABLY A LITTLE BIT PAST FOUR O'CLOCK, I WENT BACK IN THE CELL AND ACTUALLY WENT UP AND OBSERVED IT, LOOKED AT IT AND IT WAS ACTUALLY TOILET PAPER WITH INK ON IT THAT WAS STUCK INTO THE CRACKS AROUND THE BLOCK.

Q NOW, YOU CAN DESCRIBE – YOU SAID THAT YOU WENT IN – ABOUT WHAT TIME WOULD YOU HAVE GONE IN IN THE MORNING?

A SIR?

Q ABOUT WHAT TIME WOULD YOU HAVE DONE THAT –

A ABOUT WHAT TIME? WELL, THE FIRST TIME I GO INTO THE CELL IS GOING TO BE PROBABLY AROUND 6:30 WHEN WE BRING IN THE FOOD TRAYS.

Q AND LATER ON, YOU SAID YOU WENT BACK INTO THE CELL?

A YES.

[1675] AND WHAT TIME WAS THAT?

A IN BETWEEN FOUR AND 4:20, SOMEWHERE ABOUT THAT TIME.

Q IS THAT NEAR THE END OF YOUR SHIFT?

A YES, SIR.

Q NOW, WHEN YOU WENT IN THERE, WHAT WERE YOU ACTUALLY CHECKING?

A I WAS ACTUALLY CHECKING – YOU'RE TALKING ABOUT IN THE AFTERNOON?

Q UH-HUH.

A I WAS ACTUALLY CHECKING THE WALL THAT LOOKED LIKE IT HAD INK AROUND THE MORTAR JOINT.

Q NOW, WHERE DID YOU GO TO IN THAT CELL TO CHECK ON THAT?

A I WALKED – WHEN I OPENED THE DOOR, I WENT STRAIGHT BACK AND RIGHT ABOVE THE TOP BUNK, ABOUT TWO BLOCKS UP, I WAS CHECKING OUT THAT CEMENT RIGHT THERE AROUND THE JOINT AND IT ACTUALLY WAS TOILET PAPER.

Q OKAY. HOW BIG WOULD YOU SAY – IF YOU COULD JUST HOLD UP YOUR HANDS FOR THIS JURY, HOW BIG ARE THOSE CINDER BLOCKS?

A IT'S PROBABLY – PROBABLY ABOUT THAT BIG (INDICATES).

Q AND ABOUT HOW HIGH WOULD YOU SAY?

A AND ABOUT THAT WIDE (INDICATES)

Q AND WHAT DID YOU SAY THAT YOU FOUND ONCE YOU ACTUALLY WENT IN THERE AND CHECKED ON THAT?

[1676] A IT WAS TOILET PAPER WITH INK ON IT AND IT WAS STUFFED BACK INTO THE CRACKS.

Q AND WHERE WOULD THAT HAVE BEEN IN RELATION TO THAT CINDER BLOCK?

A IT WAS AROUND THE CINDER BLOCK.

Q WHAT WOULD NORMALLY BE THERE AROUND THAT CINDER BLOCK?

A NORMALLY IT WOULD BE MORTAR, BUT THERE WAS NONE THAT I COULD SEE. IT WAS ALL TOILET PAPER.

Q SO IT WAS ACTUALLY TISSUE?

A YES, SIR.

Q WHAT CONDITION WAS IT IN? WAS IT DRY OR WAS IT WET?

A IT WAS DRY TO THE TOUCHED AREA THAT I TOUCHED.

Q ONCE YOU HAD FOUND THAT THAT CINDER BLOCK AND THAT MORTAR AROUND IT OR WHAT WAS SUPPOSED TO BE MORTAR AROUND IT WAS ACTUALLY TISSUE, DID YOU DO ANY FURTHER SEARCHING AT THAT POINT?

A NO, SIR, I DIDN'T SEARCH NO MORE, BUT I ASKED THE FELLOWS IN THE ROOM HOW LONG HAS THIS BEEN HERE AND THE FELLOW ON THE TOP BUNK HE REPLIED, WELL, IT'S BEEN HERE AS LONG AS I'VE BEEN HERE –

MR. KIRKLAND: OBJECTION, YOUR HONOR. IT'S HEARSAY.

THE COURT: SUSTAIN THE OBJECTION.

MR. CHASE: AFTER YOU HAD CONFRONTED THE PEOPLE [1677] IN THE CELL WHAT HAD HAPPENED, WHAT DID YOU DO?

THE WITNESS: I WENT BACK. I TALKED TO – I CALLED MY SERGEANT AND NOTIFIED HIM AND LET HIM KNOW. HE TOLD ME TO WRITE IT DOWN IN THE PASS-ON BOOK AND NOTIFY THE NEXT OFFICER THAT COMES ON SO THAT HE CAN DO A FURTHER INVESTIGATION ON IT.

Q SO YOU DIDN'T DO ANYMORE SEARCHING OF THAT CELL AT THAT POINT?

A NO, SIR.

Q BUT HAD YOU INFORMED – WERE THE INMATES ACTUALLY IN THAT CELL WHEN YOU WALKED IN AND CHECKED ON –

A YES, SIR.

Q – THE MORTAR?

A YES, SIR.

Q ALL THREE OF THEM WERE IN THERE?

A YES, SIR.

Q INCLUDING WILLIAM ARTHUR KELLY?

A YES, SIR.

Q AND THEY WERE THERE WHEN YOU LEFT?

A YES, SIR.

Q NOW, YOU SAID THAT YOU HAVE BEEN A CORRECTIONAL OFFICER FOR TWO YEARS?

A YES, SIR.

Q DURING THE COURSE OF THAT TIME, HAVE YOU – HOW MANY CELL CHECKS WOULD YOU SAY THAT YOU HAVE DONE?

[1678] A I COULDN'T EVEN BEGIN TO TELL YOU HOW MANY I'VE CHECKED.

Q THROUGH YOUR EXPERIENCE AS A CORRECTIONAL OFFICER, IF YOU HAD GONE BACK IN LATER THAT DAY AND NOT FOUND A TOOL –

MR. KIRKLAND: OBJECTION, YOUR HONOR –

MS. FULLWOOD: – THAT'S SPECULATIVE.

MR. KIRKLAND: – THAT'S SPECULATIVE AND HE'S ASKING A HYPOTHETICAL QUESTION.

THE COURT: I SUSTAIN THE OBJECTION.

MR. CHASE: HOW OFTEN – HOW LONG HAVE YOU BEEN A CORRECTIONAL OFFICER?

A TWO YEARS.

Q AS A PART OF YOUR DUTIES, DO YOU GO INTO CELLS AND ACTUALLY DO CHECKS?

A YES, SIR.

Q AND WHAT ARE YOU LOOKING FOR?

A WE ARE LOOKING FOR – I MEAN, ANY TYPE OF CONTRABAND. I MEAN, IT CAN BE ANYTHING

FROM CLOTHES - I MEAN, I'VE FOUND ANYTHING FROM CLOTHES TO SHANKS.

Q INCLUDING SHANKS. WOULD YOU ALSO - IF YOU SAW SIGNS THAT THERE HAD BEEN ANY SORT OF SCRAPPING [sic] BEING DONE ON THE WALL, WOULD YOU ACTUALLY BE LOOKING FOR A TOOL?

A YES, SIR.

Q AND IS THAT A PART OF YOUR DUTIES?

A YES, SIR.

[1679] Q AND ACTUALLY - HAVE YOU ACTUALLY DONE THAT IN THE PAST?

A YES, SIR.

Q IN FACT, HAVE YOU EVER HAD AN INMATE; FOR EXAMPLE, THAT WOULD HAVE HAD A TATTOO DONE? HAVE YOU EVER CHECKED -

A YES, SIR.

Q - BACK IN THE CELL TO TRY TO FIND IF THEY HAD A TOOL THAT WOULD HAVE BEEN USED FOR THAT?

A YES, SIR.

Q DO YOU ALWAYS FIND THE TOOL?

A NO, SIR.

Q AND YOU HAVE DONE THAT OVER THE COURSE OF TWO YEARS?

A YES, SIR.

Q BASED ON YOUR EXPERIENCE IN DOING THOSE SEARCHES, DOES THE FACT THAT YOU DON'T FIND A TOOL IN THERE SHOW THAT IT WASN'T DONE BY THE PEOPLE WHO WERE IN THAT CELL?

A NO, SIR.

[1692] **JACKIE D. GRANGER - DIRECT**
BY MR. CHASE

* * *

JACKIE D. GRANGER,

FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME AND SPELL YOUR LAST NAME, SIR.

THE WITNESS: MY NAME IS JACKIE D. GRANGER. I SPELL MY LAST NAME G-R-A-N-G-E-R.

DIRECT EXAMINATION

BY MR. CHASE:

Q OFFICER GRANGER, WHERE ARE YOU EMPLOYED?

A LEXINGTON COUNTY DETENTION CENTER, SIR.

Q WHAT ARE YOUR DUTIES THERE?

A MASTER CORRECTIONAL OFFICER.

[1693] Q WHAT ARE THE DUTIES OF A MASTER CORRECTIONAL OFFICER?

A THE DUTIES OF A MASTER CORRECTIONAL OFFICER IS YOU ARE IN CHARGE OF THE BOOKING AREA. YOU ARE IN CHARGE OF EVERYTHING THAT GOES ON IN THE BOOKING AREA TO INCLUDE RECEIVING THE INMATES, YOU KNOW, AND PREPARE FOR COURT, BOND COURT THE NEXT MORNING, HOUSING THEM AND IF THEY NEED MEDICAL ATTENTION, IMMEDIATE MEDICAL ATTENTION, YOU MAKE SURE THAT IS TAKEN CARE OF AT THAT TIME, TOO, AND YOU MAKE SURE THEY GET THEIR PHONE CALLS.

Q DO YOU ALSO HAVE ANY ADDITIONAL SUPPORT DUTIES AS MASTER CORRECTIONAL OFFICER?

A YES, SIR, I DO. I AM ON CALL AS THE ASSISTANT TO THE SHIFT SERGEANT WHEN AND WHEREVER NEEDED IN THE WHOLE FACILITY.

Q AND HOW LONG HAVE YOU BEEN EMPLOYED OVER AT THE DETENTION CENTER?

A FOUR AND ONE-HALF YEARS, SIR.

Q WHAT EXPERIENCE DO YOU HAVE PRIOR TO THAT?

A MILITARY OVER 24 YEARS.

Q AND WHAT BRANCH?

A ARMY.

Q NOW, IN YOUR DUTIES OVER AT THE DETENTION CENTER, HAVE YOU EVER HAD CONTACT WITH THE INMATES?

A YES, SIR.

Q AS A PART OF YOUR CONTACT WITH THE INMATES, HAVE YOU [1694] EVER PERFORMED CELL CHECKS?

A PERIODICALLY, SIR. WE DO CELL CHECKS ALMOST ON A MONTHLY BASIS.

Q NOW, ARE THERE DIFFERENT TYPES OF CELL CHECKS THAT CORRECTIONAL OFFICERS WOULD DO ON A DAILY BASIS –

A YES, SIR –

Q – VERSUS A SHAKEDOWN?

A A SHAKEDOWN IS CONDUCTED PERIODICALLY. BASICALLY ONCE A MONTH WE TRY TO DO A SHAKEDOWN OF EVERY CELL IN THE FACILITY. IT DOES NOT ALWAYS HAPPEN DUE TO MANPOWER SHORTAGE, BUT WE TRY TO.

Q WHAT'S INVOLVED IN A SHAKEDOWN?

A WHEN YOU GO INTO – TO DO A SHAKEDOWN, YOU ARE LOOKING FOR ANY OBJECT THAT IS NOT AUTHORIZED BY JAIL POLICY. WHEN YOU WALK INTO – FIRST OF ALL, YOU OPEN THE DOOR. YOU ASK THE INMATES TO STEP OUT INTO THE HALLWAY. THE INMATES STEP OUT IN THE HALLWAY. YOU PAT THEM DOWN, MAKE SURE THEY ARE NOT CONCEALING NOTHING ON THEIR PERSON

AND THE WAY I CONDUCT A CELL SHAKE MYSELF IS I FIND MYSELF A STARTING POINT AND I START AT THAT POINT AND I WORK MY WAY COMPLETELY AROUND THE ROOM, BACK TO MY STARTING POINT. THAT WAY I ASSURE MYSELF I DON'T MISS ANYTHING OUT OF THE ORDINARY.

Q WHAT ARE YOU CHECKING WHEN YOU ARE DOING THAT?

A CONTRABAND, ANYTHING THAT MIGHT – ANY PLACE THAT [1695] MIGHT HAVE BEEN TAMPERED ALONG THE WALL FOR POSSIBLE ESCAPE REASONS, SHANKS. LIKE I SAID BEFORE, ANY MATERIAL, OBJECT THAT IS NOT AUTHORIZED BY JAIL POLICY.

Q OFFICER GRANGER, WERE YOU INVOLVED IN A SHAKEDOWN ON AUGUST THE 19TH OF THIS YEAR? LAST MONTH?

A YES, I WAS.

Q WHERE WAS THAT?

A WHEN WAS THAT?

Q WHERE WAS THAT? WHAT CELL?

A 3-A-7. FLOOR THREE – EXCUSE ME, FLOOR THREE CELL A-7.

Q AND WHAT INFORMATION DID YOU HAVE AT THAT TIME THAT LED YOU TO GO TO THE SHAKEDOWN?

A WE WERE INFORMED BY THE – OUR OFFICER THAT THE OFFICER HE RELIEVED HAD SAID THAT

THERE WAS POSSIBLE TAMPERING BEING DONE IN 3-A-7.

Q NOW, BASED ON THAT, WHAT DID YOU DO AND WHO DID YOU DO IT WITH?

A WE HELD OFF CHECKING THE CELL UNTIL AFTER LOCKDOWN WHICH WAS –

Q WHY WAS THAT?

A WE DO THAT FOR SAFETY REASON FOR US AND OTHER INMATES THAT MIGHT BE WANDERING IN THE ARAE DURING REC TIMES.

Q WHY DOES THAT INCREASE YOUR SAFETY?

A BECAUSE WE – IT INCREASES OUR SAFETY BECAUSE YOU CAN [1696] PAY MORE ATTENTION TO WHAT YOU ARE DOING AND NOT WORRY ABOUT OTHER INMATES BEING IN THE DAYROOM OR WHEREVER TRYING TO DISTRACT YOUR ATTENTION.

Q AND IF YOU COULD EXPLAIN TO THE JURY WHAT EXACTLY LOCKDOWN IS?

A LOCKDOWN IS CONDUCTED AT ELEVEN-THIRTY EVERY NIGHT AND WHAT WE DO AT LOCKDOWN, WE MAKE SURE THAT EVERY INMATE IS SECURED IN HIS CELL AND AFTER EVERY INMATE IS CONCEALED IN THEIR CELL, THE FLOOR OFFICER WILL DO A COMPLETE HEAD COUNT AND DURING HIS HEAD COUNT, HE MUST SEE FLESH. WHETHER IT'S JUST A HAND OR WHATEVER, BUT HE HAS TO SEE FLESH. HE TAKES HIS ROSTER WITH HIM AND HE GOES DOWN HIS ROSTER. HE GOES LIKE SAY,

FOR INSTANCE 3-A-1 AND THE ROSTER SAYS HE'S GOT THREE PEOPLE IN THERE. HE MAKES SURE HE'S GOT THREE PEOPLE IN THAT CELL AND HE DOES THAT CELL TO CELL UNTIL HE'S COMPLETELY DONE AND THEN HE CONFIRMS HIS COUNT THROUGH THE BOOKING OFFICER.

Q WHEN INMATES ARE NOT ON LOCKDOWN, DO THEY HAVE FREE MOVEMENT ALONG THE WINGS?

A THEY HAVE FREE MOVEMENT ALONG THE WING THAT THEY COME OUT OF AND THE DAY-ROOM.

Q SO YOU ARE SAYING THAT WHEN YOU LOCK THEM DOWN, THERE WOULD BE NO ONE MOVING ON THAT WING EXCEPT FOR CORRECTIONAL OFFICERS?

A THAT'S CORRECT.

[1697] Q ALL THE INMATES WOULD BE IN THEIR CELLS?

A THAT'S CORRECT.

Q AND THAT WOULD INCREASE YOUR SAFETY IN PERFORMING A SHAKEDOWN?

A THAT IS CORRECT.

Q NOW, YOU SAID THAT WHEN YOU GO IN ON A SHAKEDOWN, WHAT DO YOU DO?

A WHEN I CONDUCT A SHAKEDOWN, WE OPEN THE DOOR. WE ASK THE INMATES TO STEP OUT IN THE HALLWAY.

Q NOW, WHEN THE INMATES STEP OUT IN THE HALLWAY, WOULD THERE BE ANY OTHER INMATES WITH THEM?

A NO, SIR. JUST THE ONES IN THAT PARTICULAR ROOM.

Q AND WHEN YOU WENT TO SHAKEDOWN THE CELL ON THE THIRD FLOOR, A WING, 7 CELL, WHO WAS IN THAT ROOM? WAS WILLIAM ARTHUR KELLY IN THAT ROOM?

A YES, SIR.

Q WERE THERE ANY OTHER INMATES?

A TWO OTHER INMATES IN.

Q WHAT DID YOU DO WITH THEM WHEN YOU WENT IN THERE?

A FIRST OF ALL, WE ASKED THE INMATES TO STEP OUTSIDE. THEY COMPLIED WITH THE ORDER. THE INMATES WERE PATTED DOWN TO ENSURE THEY WERE NOT – HAVE ANY TYPE OF CONTRABAND ON THEIR BODY, ON THEIR PERSON.

Q WAS WILLIAM ARTHUR KELLY PATTED DOWN?

A YES, SIR, HE WAS

Q WAS ANYTHING FOUND ON HIM?

A NO, SIR.

Q WAS ANYTHING FOUND ON THE OTHER TWO INMATES?

A NO, SIR.

Q WHAT DID YOU DO ONCE YOU HAD PATTED DOWN THOSE INMATES?

A SAY THAT AGAIN, PLEASE?

Q WHAT DID YOU DO ONCE YOU HAD FINISHED PATTING DOWN THE INMATES?

A ONE OFFICER REMAINED IN THE HALLWAY WITH THE INMATES TO OBSERVE THEIR - EXCUSE ME, TO OBSERVE THEM. MYSELF AND ANOTHER OFFICER WENT INTO THE ROOM AND BEGIN TO DO A SEARCH OF THE CELL.

Q AND THIS IS A VERY THOROUGH SEARCH?

A THOROUGH SEARCH, YES, SIR.

Q WHAT DID YOU FIND WHEN YOU WERE IN THERE?

A WE FOUND ABOVE THE SECOND BUNK, TOP BUNK, SECOND BRICK TO THE RIGHT, THE FIRST BRICK DOWN FROM THE CEILING WHERE IT HAD BEEN TAMPERED WITH AND MORTAR HAD BEEN REMOVED AND TOILET PAPER HAD BEEN MOLDED AROUND THE BRICK TO APPEAR LIKE THE MORTAR WAS STILL THERE. HOWEVER, IT HAD BEEN COLORED GRAYISH-BLUE COLOR AND THAT WAS BROUGHT TO OUR ATTENTION IMMEDIATELY.

Q TELL ME WHAT CONDITION WAS THIS TISSUE PAPER IN WHEN YOU ACTUALLY - WHEN YOU ACTUALLY FELT IT?

[1699] A WHEN WE REMOVED IT, IT WAS DRY, SIR.

Q WHAT SHAPE WAS IT IN?

A IT WAS - IT WAS IN A SHAPE OF JUST LIKE A MORTAR THAT WOULD ACTUALLY GO AROUND A BRICK. IT WAS IN THAT SHAPE.

Q COULD IT HAVE BEEN REMOVED AND THEN PUT BACK IN AND RETAINED ITS SHAPE?

A YES, SIR. IT COULD BE REMOVED AND PUT BACK IN JUST LIKE A PUZZLE PUT TOGETHER.

Q DID YOU, IN FACT, REMOVE THAT TISSUE FROM AROUND THAT CINDER BLOCK?

A NOT ME MYSELF, SIR. I OBSERVED IT BEING REMOVED.

Q IT WAS DONE IN YOUR PRESENCE?

A YES, SIR.

Q ASK IF YOU CAN IDENTIFY THIS?

A YES, SIR. THAT'S THE TISSUE PAPER THAT WAS REMOVED FROM AROUND THE BLOCK.

Q THAT NIGHT, AUGUST THE 19TH OF 1998?

A YES, SIR.

Q FROM CELL 3-A-7?

A 3-A-7, YES, SIR.

Q THE CELL THAT WILLIAM ARTHUR KELLY WAS IN?

A THAT IS CORRECT.

Q AT THIS TIME, YOUR HONOR, WE WOULD MOVE THIS INTO EVIDENCE.

[1700] THE COURT: ANY OBJECTION?

MR. KIRKLAND: YOUR HONOR, WE WOULD OBJECT, BASED ON THE SAME REASON WE OBJECTED TO THIS LINE OF TESTIMONY.

THE COURT: OBJECTION IS OVERRULED. IT WILL BE ADMITTED AS STATE'S NUMBER 66.

MR. CHASE: THANK YOU, YOUR HONOR.

(WHEREUPON, STATE'S EXHIBIT NUMBER 66, ENVELOPE/TISSUE, ENTERED INTO EVIDENCE AT THIS TIME OVER OBJECTION OF COUNSEL.)

MR. CHASE: OFFICER GRANGER, WOULD YOU PLEASE STEP DOWN, HERE?

THE WITNESS: YES, SIR.

Q NOW, IF YOU WOULD, PLEASE, TAKE OUT A PIECE OF WHAT YOU DISCOVERED WAS AROUND THAT CINDER BLOCK THAT NIGHT AND SHOW THE JURY EXACTLY WHAT YOU ARE TALKING ABOUT?

A THIS IS TISSUE PAPER AND IT'S MADE TO LOOK LIKE MOLDING THAT WOULD GO AROUND THE CINDER BLOCK. AND WHEN IT'S PLACED UP ON THE WALL, IT WOULD APPEAR TO BE – IT WOULD FIT PERFECTLY INTO THE CRACK WHERE THE ORIGINAL MOLDING WAS – OR MORTAR.

Q WHAT ARE THE MARKINGS – WHAT'S THE MARKING ON THIS SIDE VERSUS ON THIS SIDE?

A THE COLORATION ON THE FRONT SIDE WOULD BE TO – TO TRY TO MAKE THIS APPEAR LIKE IT WAS THE MORTAR.

Q IN YOUR EXPERIENCE, HAVE YOU EVER SEEN – HAVE YOU [1701] EVER FOUND INMATES TO WRITE ON THE WALLS?

A YES, SIR.

Q HAVE A SEAT.

A (WITNESS COMPLIES).

Q OFFICER GRANGER, ONCE YOU HAD REMOVED THIS TISSUE THAT HAD REPLACED THE MORTAR AROUND THAT CINDER BLOCK IN 3-A-7, WHAT DID YOU FIND?

A WE FOUND THAT THE MORTAR THAT HAD BEEN REMOVED AND HAD BEEN COMPLETELY GOUGED OUT TO APPROXIMATELY THE DEPTH OF FOUR TO FIVE INCHES ON ONE SIDE AND HAD BEEN GOUGED OUT QUITE A BIT ALL THE WAY AROUND THE BLOCK.

Q NOW, THE MORTAR THAT SURROUNDS THOSE CINDER BLOCKS CAN THAT BE REMOVED WITH A FINGER?

A NO, SIR, I DON'T THINK SO.

Q IN YOUR OPINION, WOULD A TOOL HAD TO BE USED?

A YES, SIR, I THINK SO.

Q TO DO THE DAMAGE THAT WAS DONE IN THIS CASE?

A YES, SIR.

Q ASK YOU, OFFICER GRANGER, CAN YOU IDENTIFY THESE PHOTOS?

Q YES, SIR. YES, SIR, I CAN.

Q WHAT ARE THOSE?

A THOSE ARE THE PHOTOS WE TOOK THE NIGHT OF THE INCIDENT OF THE CINDER BLOCK.

Q AND THIS IS AFTER THE TISSUE HAD BEEN REMOVED OR [1702] BEFORE?

A AFTER, SIR.

Q AND THIS IS THE CONDITION THAT YOU FOUND IT THAT NIGHT?

A YES, SIR.

Q NOW, OBVIOUSLY, THESE PHOTOS WERE TAKEN LATER. IS IT STILL IN THE SAME CONDITION?

A YES, SIR.

Q DOES THAT FAIRLY AND ACCURATELY DEPICT -

A YES, SIR.

Q - HOW IT LOOKED THAT NIGHT?

A YES, SIR.

Q YOUR HONOR, AT THIS TIME, WE WOULD MOVE THESE INTO EVIDENCE.

MR. KIRKLAND: OBJECTION ON THE SAME GROUNDS AS THIS LINE OF TESTIMONY.

THE COURT: OBJECTION IS OVERRULED. IT WILL BE ADMITTED AS STATE'S 67 AND 68.

MR. CHASE: THANK YOU, YOUR HONOR.

(WHEREUPON, STATE'S EXHIBIT NUMBER 67 AND 68, PHOTOGRAPHS, ENTERED INTO EVIDENCE AT THIS TIME OVER OBJECTION OF COUNSEL.)

MR. CHASE: OFFICER GRANGER, IF YOU COULD, STEP DOWN ONE MORE TIME.

THE WITNESS: YES, SIR.

[1703] Q AND FIRST, ON THIS END, IF YOU WOULD PLEASE DESCRIBE WHERE THAT IS IN THE CELL AND EXPLAIN WHAT IT DEPICTS AND EXPLAIN WHAT YOU FOUND. MAKE SURE THE JURORS CAN SEE YOU AS YOU POINT THAT OUT.

A OKAY. AS YOU WALL THROUGH THE CELL, THIS WOULD BE THE BACK OF THE CELL. THIS WOULD BE THE LEFT-HAND CORNER. THIS WOULD BE THE SECOND BLOCK TO THE RIGHT, THE FIRST BLOCK DOWN FROM THE CEILING. AND THE DISCOLORATION HERE IS WHERE THE MORTAR WAS GOUGED OUT.

Q NOW, WHAT DOES THIS PICTURE DEPICT ALONG THESE JOINTS HERE BETWEEN THESE CINDER BLOCKS?

A IT LOOKS LIKE POSSIBLE MILDEW AND MORTAR.

Q STEP DOWN HERE AND SHOW THIS END OF THE JURY BOX.

A YES, SIR.

THIS HERE PICTURE DEPICTS THE BACK OF THE CELL. THIS WOULD BE THE LEFT-HAND CORNER, THIS WOULD BE THE SECOND BLOCK TO YOUR RIGHT, THE FIRST BLOCK FROM THE CEILING. AND THE DISCOLORATION IS WHERE THE MORTAR WAS REMOVED.

Q NOW, REFERRING TO THE STATE'S EXHIBIT NUMBER 67, IS THAT A CLOSER VIEW OF WHAT – OF THE DAMAGE THAT WAS DONE AROUND THAT CINDER BLOCK?

A YES, SIR.

Q PLEASE DESCRIBE TO THE JURY WHAT YOU FOUND THERE?

A OKAY. ON THIS SIDE HERE (INDICATES), THE BLOCK WAS [1704] GOUGED IN ABOUT – I WOULD SAY AROUND FOUR OR FIVE INCHES.

Q STEP DOWN AND GIVE THE OTHER JURORS AN OPPORTUNITY TO SEE THAT.

A YES, SIR.

THIS IS ON THE SIDE HERE WHERE THE GOUGE WAS AT, FOUR TO FIVE INCHES DEEP.

Q RETURN TO YOUR SEAT, OFFICER GRANGER.

A (WITNESS COMPLIES.)

Q ONCE YOU HAD FOUND THAT THE MORTAR AROUND THIS CINDER BLOCK HAD BEEN REMOVED, WHAT DID YOU DO?

A I TOOK – I PERSONALLY TOOK ONE INMATE AT A TIME DOWN TO THE SHOWER AND WE DID A STRIP SEARCH ON THEM TO MAKE SURE THEY WERE NOT HIDING THE OBJECT THAT WAS USED TO GOUGE THE MORTAR OUT BECAUSE WE COULD NOT FIND IT IN THE ROOM.

Q WERE ALL THREE INMATES SEARCHED?

A ALL THREE INMATES WERE SEARCHED THE SAME WAY, YES, SIR.

Q INCLUDING WILLIAM ARTHUR KELLY?

A YES, SIR.

Q WAS ANYTHING FOUND ON HIM?

A NO, SIR.

Q NOW, YOU SAID YOU DID A – CONTINUED WITH YOUR SEARCH OF THE ROOM?

A YES, SIR. WE CONTINUED TO SEARCH THE ROOM FOR THE OBJECT AND WHEN THAT WAS NOT FOUND, WE DID THE OTHER [1705] SEARCH.

Q YOU SAID IT WAS NOT FOUND IN THE ROOM?

A NO, SIR.

Q WERE YOU SURPRISED NOT TO FIND THAT?

A NO, SIR.

JACKIE D. GRANGER –
CROSS BY MR. KIRKLAND

* * *

[1710] Q OKAY. LET ME ASK YOU A COUPLE OF THINGS. HOW LONG HAVE YOU BEEN IN CORRECTIONS?

A FOUR AND A HALF YEARS, SIR.

Q AND YOU'VE BEEN AT LEXINGTON THE WHOLE TIME?

A YES, SIR.

Q SO YOU HAVE DEALT WITH INMATES WHEN THEY COME IN AND PLACED THEM IN CUSTODY AND THIS SORT OF THINGS?

A THAT'S CORRECT.

Q IS IT UNUSUAL FOR AN INMATE TO BE LOUD OR USE PROFANITY?

A UH – THERE ARE SOME THAT DO. THERE ARE SOME THAT DON'T.

Q WELL, I MEAN, IT'S NOT UNCOMMON, IS IT?

A NO, SIR.

Q I MEAN, WE ARE NOT TALKING ABOUT THE BEST PEOPLE IN SOCIETY ARE IN JAIL, ARE WE?

A THAT'S CORRECT.

[1711] **FELIX E. WILLIAMS –**
DIRECT BY MR. CHASE

* * *

FELIX E. WILLIAMS,

FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME FOR THE RECORD. THE WITNESS: MY FULL NAME IS FELIX E. WILLIAMS, W-I-L-L-I-A-M-S.

DIRECT EXAMINATION

BY MR. CHASE:

Q CAPTAIN WILLIAM, WHERE DO YOU WORK?

A AT THE LEXINGTON COUNTY DETENTION CENTER.

Q WHAT POSITION DO YOU HOLD THERE?

A I'M THE JAIL ADMINISTRATOR.

Q WHAT DOES THE JAIL ADMINISTRATOR DO?

A BASICALLY, I OVERSEE THE DAILY OPERATIONS OF THE JAIL. WE HAVE FOUR SHIFTS AND MY BASIC FUNCTION IS TO MAKE SURE THAT EVERYTHING RUNS AS SMOOTH AS POSSIBLE.

[1712] Q HOW LONG HAVE YOU BEEN EMPLOYED AS THE ADMINISTRATOR?

A A LITTLE OVER A YEAR.

Q AND HOW LONG HAVE YOU BEEN EMPLOYED AT THE DETENTION CENTER?

A JUST ABOUT FIVE YEARS.

Q WHAT DID YOU DO PRIOR TO THAT TIME THAT YOU'VE BEEN HOLDING THE POSITION OF THE JAIL ADMINISTRATOR?

A I WAS A SHIFT SERGEANT. PRIOR TO THAT, I WAS A MASTER CORRECTIONAL OFFICER AND PRIOR TO THAT, I WAS A CORRECTIONAL OFFICER.

Q AS A SHIFT SERGEANT, WHAT WERE YOUR DUTIES?

A AS A SHIFT SERGEANT, BASICALLY I WAS RESPONSIBLE FOR THE SHIFT, NORMALLY AROUND TWELVE OR THIRTEEN PEOPLE, THE SAFETY AND SECURITY OF APPROXIMATELY ANYWHERE BETWEEN FOUR AND FIVE HUNDRED INMATES.

Q AND WHAT WERE YOUR DUTIES AS A MASTER CORRECTIONAL OFFICER?

A I OPERATED IN THE BOOKING AREA WHICH BASICALLY RECEIVES AND DISCHARGES THE INMATES AS WELL AS YOU ARE THE BACKUP FOR THE SERGEANT OF THE SHIFT.

Q AND WHAT WERE YOUR DUTIES AS A CORRECTIONAL OFFICER?

A BASICALLY, THE SAFETY AND SECURITY OF THE INMATES ASSIGNED TO THE FLOOR, THE ANNEX OR THE BOOKING AREA.

Q YOU'VE HELD JUST ABOUT EVERY POSITION AT THE LEXINGTON DETENTION CENTER THAT YOU CAN HOLD?

[1713] A YES, SIR, I HAVE.

Q I ASK YOU, AS A PART OF YOU [SIC] DUTIES AS THE JAIL ADMINISTRATOR, WERE YOU INVOLVED IN THE INVESTIGATION OF AN ATTEMPTED ESCAPE IN CELL 3-A-7?

A YES, SIR, I WAS.

Q CAN YOU PLEASE DESCRIBE WHAT WAS FOUND IN THAT CELL THAT INDICATED THERE WAS AN ATTEMPT TO ESCAPE?

A WELL, I ALWAYS GET THE REPORTS FIRST THING IN THE MORNING. IT'S LISTED ON OUR VOICE MAIL IN THE EVENINGS AND THEN IN THE MORNINGS, WE COME IN AND THE REPORTS ARE WRITTEN UP FOR US TO READ AND GO THROUGH. THAT MORNING I CAME ON ON THE 20TH, HAD BEEN TOLD OF TWO POSSIBLE ESCAPES THAT NIGHT. THERE WERE TWO FINDINGS. ONE ON THIRD FLOOR AND ONE ON FIRST FLOOR THAT THEY WENT LOOKING FOR. READ THE BASIC WHOLE PAPERWORK, DECIDED TO TALK TO THE INMATES INVOLVED OF WHICH I DID. INTERVIEWED ALL THREE OF THE PEOPLE IN THE CELL WHICH WAS MR. KELLY, MR. METTS AND MR. BLACK. I MADE A DETERMINATION THAT THERE HAD BEEN

AN ACTUAL ATTEMPT TO GET OUT OF THE JAIL AND AT THAT TIME, I PROCEEDED WITH CHARGING THEM WITH ATTEMPTED ESCAPE, MALICIOUS INJURY TO JAIL AND CONSPIRACY.

Q DID YOU ACTUALLY GO INTO CELL 3-A-7 THAT NIGHT?

A NOT THAT NIGHT. THE NEXT MORNING I DID.

Q WHAT DID YOU FIND IN THAT CELL?

A BASICALLY, ON THAT END OF THE JAIL, WHICH IS THE A [1714] WING, THERE'S BEEN SOME SETTLEMENT AND THERE ARE SOME BLOCKS THAT ARE CRACKED ALONG THE MORTAR AREAS LIKE YOU WOULD FIND IN ANY OTHER NORMAL CONCRETE BLOCK STRUCTURE. WHAT THEY – WHAT PEOPLE HAD DONE, HAD TAKEN AROUND THAT BLOCK AND CHISELED OUT THE MORTAR IN ORDER TO TRY TO BREAK OPEN A HOLE. THAT HOLE WOULD HAVE BEEN APPROXIMATELY EIGHT INCHES BY SIXTEEN INCHES.

Q WHAT WAS THE CONDITION – HOW WAS THAT TISSUE ATTEMPTED TO BE CONCEALED?

A THIS TISSUE WAS USED TO BASICALLY CONCEAL WHERE MORTAR HAD BEEN TAKEN OUT AROUND THE BLOCK?

A TISSUE IS A COMMON THING TO USE TO TRY TO HIDE THESE ATTEMPTED ESCAPES.

Q OFFICER WILLIAMS OR CHIEF WILLIAMS, DID YOU GO BACK INTO THAT CELL AND TAKE

MEASUREMENTS OF THE MORTAR THAT HAD BEEN REMOVED?

A YES, I HAVE BEEN BACK IN THAT CELL MANY TIMES.

Q IN FACT, DID YOU TAKE MEASUREMENTS OF THE DEPTH THAT THE DIGGING HAD GONE TO?

A YES, I DID. I TAKE – I TOOK BASICALLY AN EXTENDABLE RULER, PLACED IT INTO THE HOLE AND THEN TOOK PICTURES OF THAT.

Q AND YOU DID THAT YOURSELF?

A YES, SIR.

MR. KIRKLAND: OBJECTION, YOUR HONOR. THIS IS [1715] REPETITIVE. THERE'S BEEN TESTIMONY TO THE DEPTH.

THE COURT: OVERRULED.

MR. CHASE: DID YOU TAKE PHOTOGRAPHS OF THAT?

THE WITNESS: YES, I – WELL, I DID NOT TAKE THE PHOTOGRAPHS. I HAD THEM TAKEN.

Q AND YOU WERE ACTUALLY HOLDING THE RULER?

A YES.

Q ASK, CAN YOU IDENTIFY THESE?

A YES, THESE ARE 3-A-7. THIS IS BRICKS –

Q CAN YOU IDENTIFY WHAT IS IN THOSE PHOTOGRAPHS?

A BASICALLY, THE DEPTHS OF THE CHISELLING AROUND THE BLOCKS AS THE RULER SHOWS. IN SOME PLACES, IT'S UP TO FIVE INCHES DEEP.

Q NOW, ARE THESE THE ACTUAL PHOTOGRAPHS THAT WERE TAKEN AS YOU HELD THAT RULER THAT –

A NO. THE ACTUAL PHOTOGRAPHS ARE HERE. THOSE ARE BLOWUPS.

Q THESE ARE ENLARGEMENTS OF THOSE PHOTOGRAPHS?

A THAT'S CORRECT.

Q DOES IT FAIRLY AND ACCURATELY DEPICT THE MEASUREMENTS THAT YOU TOOK?

A YES, ABSOLUTELY.

Q FROM CELL 3-A-7?

A CORRECT.

Q AT THIS TIME, YOUR HONOR, WE WOULD MOVE THESE INTO [1716] EVIDENCE.

MR. KIRKLAND: OBJECTION. BASED ON THE SAME – OBJECTION TO ALL OF THIS TESTIMONY.

THE COURT: OBJECTION IS OVERRULED. IT WILL BE ADMITTED AS STATE'S 69, 70 AND 71.

MR. CHASE: THANK YOU, YOUR HONOR.

(WHEREUPON, STATE'S EXHIBIT NUMBER 69, 70 AND 71, PHOTOGRAPHS, ENTERED INTO EVIDENCE AT THIS TIME OVER OBJECTION OF COUNSEL.)

MR. CHASE: CAPTAIN WILLIAMS, IF YOU WOULD – CAPTAIN WILLIAMS, IF YOU WOULD, PLEASE STEP DOWN.

A (WITNESS COMPLIES.)

Q AND FIRST, REFERRING TO STATE'S EXHIBIT NUMBER 69, IF YOU COULD STAND DOWN AT THIS END OF THE JURY BOX AND EXPLAIN EXACTLY WHAT YOU MEASURED AND WHAT THAT PICTURE DEPICTS?

A THIS IS BASICALLY THE LOWER RIGHT-HAND CORNER WITH THE TAPE MEASURE STUCK INTO THE HOLE. WE WERE ALSO LOOKING FOR THE WIDTH AS WELL AS THE DEPTH OF HOW SOMEBODY HAD CHISELLED OUT AND THAT'S BASICALLY WHAT THAT'S A PICTURE OF.

Q AND EXACTLY – APPROXIMATELY, WHAT IS THE WIDTH ON –

A HALF AN INCH.

Q IF YOU COULD STEP DOWN HERE.

A OKAY.

[1717] Q GIVE THEM THE SAME OPPORTUNITY AND EXPLAIN WHAT THAT IS.

A BASICALLY SHOWING ONE HALF OF AN INCH AS FAR AS WIDTH GOES TO TRY TO CHISEL AROUND THAT BLOCK.

Q NOW, REFERRING TO STATE'S EXHIBIT NUMBER 70, COULD YOU PLEASE EXPLAIN WHAT THAT DEPICTS?

A THIS IS SHOWING THE DEPTH OF THE CARVING INSIDE, A PORTION AROUND A NORMAL CONCRETE BLOCK AND IT SHOWS FIVE INCHES DEEP.

Q STEP DOWN HERE AND IF YOU CAN EXPLAIN – AND EXPLAIN WHAT THAT DEPICTS.

A THE SAME THING. WE WERE LOOKING FOR DEPTH. THE RULER IS INSERTED IN. IT SHOWS FIVE INCHES DEEP HAS BEEN CARVED AROUND THAT BLOCK.

Q NOW, REFERRING TO STATE'S EXHIBIT NUMBER 71, WHAT ANGLE OF THE CELL DOES THIS DEPICT?

A THAT'S THE UPPER PART. BASICALLY YOU SEE RIGHT HERE (INDICATES), THIS IS A PART OF THE LOWER – I GUESS YOU WOULD SAY THE BOTTOM RIGHT-HAND CORNER OF THAT BLOCK. THE SAME THING SHOWING THE DEPTH OF THE PENETRATION THERE TO TRY TO GET AROUND THE BLOCK.

Q AND WHAT DOES THAT DEPICT THE DEPTH TO BE?

A ALMOST SIX INCHES.

Q YOU CAN STEP DOWN HERE. GIVE THE JURORS ON THIS END THE OPPORTUNITY TO SEE THAT.

[1718] A THIS IS THE SAME SORT OF PICTURE AS THE FIRST ONE THAT I SHOWED YOU, SHOWING SIX – ALMOST SIX INCHES DEEP IN THAT PART OF THE BLOCK.

Q GO AHEAD AND HAVE YOUR SEAT.

A (WITNESS COMPLIES.)

Q CAPTAIN WILLIAM, COULD YOU BRIEFLY DESCRIBE WHAT'S INVOLVED IN A SHAKEDOWN?

A YES. BASICALLY, A SHAKEDOWN, WE TRY TO TAKE AND COVER THE ENTIRE JAIL AT LEAST ONCE A MONTH, ALL THREE FLOORS, THE ANNEX AND THE WHOLE ROUTINE TO MAKE SURE THERE'S NO CONTRABAND IN THE JAIL. AND CONTRABAND BASICALLY CONSISTS OF ANYTHING AN INMATE IS NOT SUPPOSED TO HAVE. IT CAN BE ANYTHING FROM CLOTHING TO A WEAPON, A RAZOR BLADE, ANY SORT OF A DIGGING TOOL WHICH COULD BE A DOOR HANDLE. ANYTHING THAT COULD BE BROKEN OFF OF ANYTHING WITHIN THE JAIL AREA THAT THEY MIGHT HAVE GOTTEN TO, PIECE OF FENCE FROM THE OUTSIDE WHEN THEY GO ON OUTSIDE RECREATION. ANY OF THOSE KIND OF THINGS IS WHAT WE ARE LOOKING FOR.

WHAT HAPPENS IS WE DESIGNATE A FLOOR FOR OFFICERS TO COME IN. WE BRING OFFICERS IN OFF SHIFT, PLACE A PERSON IN CHARGE OF THEM AND THEY GO UPSTAIRS WITH A CART AND THEY START CELL BY CELL GOING DOWN THROUGH WHERE THEY TAKE THE INMATES OUT OF THE CELL.

AS M.C.O. GRANGER EXPLAINED, THE INMATES COME [1719] OUT. THEY ARE BASICALLY PATTED DOWN TO MAKE SURE THEY DON'T HAVE ANYTHING ON THEM PERSONALLY. SOMEBODY WATCHES THEM WHILE THE OTHER CELL IS BEING

SEARCHED. EVERYTHING IN THE CELL IS GONE THROUGH, LOOKED AT UNDERNEATH THE TOILET, UNDERNEATH THE MATTRESSES, IN THEIR GRAY PAILS, ANY PLACE AT ALL THAT ANYTHING COULD BE HIDDEN IN. THE VENTS, WHATEVER. IT'S A THOROUGH SEARCH JUST TO MAKE SURE THERE IS NO CONTRABAND IN THAT CELL.

Q ARE RECORDS KEPT THAT ARE KEPT IN YOUR CUSTODY OF WHEN SHAKEDOWNS ARE DONE FOR EACH CELL?

A YES, SIR.

Q AND WITH THOSE RECORDS IS IT NOTED WHETHER THERE WAS ANYTHING WRONG OR ANYTHING MISSING OR ANY CONTRABAND OR ANYTHING IN THAT CELL?

A THAT'S CORRECT. THE SUPERVISOR THAT'S DOING THAT SHAKEDOWN IS REQUIRED TO WRITE UP A REPORT THAT SAYS WHATEVER HE FOUND. IF IT WAS TEN EXTRA BLANKETS OR TWO SHANKS OR WHATEVER HE HAPPENED TO FIND DURING THAT SHAKEDOWN.

Q NOW, YOU OBVIOUSLY WENT AND INVESTIGATED CELL 3-A-7 ON AUGUST THE 19TH OF 1998, A MONTH AGO?

A THAT'S CORRECT.

Q WHEN HAD CELL 3-A-7 BEEN SHAKEN DOWN THROUGH THE NORMAL COURSE OF BUSINESS PRIOR TO THAT DAY?

A THE LAST ONE THAT WAS DONE FOR THE ENTIRE FACILITY [1720] WAS ON THE 6TH OF AUGUST.

Q OF THIS YEAR?

A THAT'S CORRECT.

Q WAS ANYTHING NOTED AS FAR AS ANY PROBLEMS IN THE CELL?

A NOTHING IN THAT CELL. NOTHING OTHER THAN JUST NORMAL TYPE OF THINGS, YOU KNOW, THAT HAD BEEN CONFISCATED.

Q NOW, PRIOR TO AUGUST THE 6TH OF THIS YEAR, WAS THAT CELL SHAKEN DOWN IN THE NORMAL COURSE OF BUSINESS AT THE DETENTION CENTER?

A YES, IT WAS.

Q AND WHEN WAS THAT?

A 15 MAY, '98.

Q WAS ANYTHING NOTED THERE THAT THERE WERE PROBLEMS WITH THAT CELL?

A NO, THERE WAS NOT. AND IF SOMETHING IS NOTED – AS FAR AS, LET'S SAY THERE WAS SOME CHISELLING GOING ON, THAT'S SORT OF AN IMMEDIATE NOTIFICATION. THE OFFICER DOING THE SHAKEDOWN AT NIGHT, YOU KNOW, IF HE JUST FOUND TEN BLANKETS AND LET'S SAY, SOME EXTRA SALT OR PEPPER OR SOMETHING LIKE THAT, THAT'S NOT ANYTHING TO GET DISTURBED OVER.

NOW, IF HE FOUND A CUTTING IN THE WALL, I WOULD HAVE BEEN IMMEDIATELY NOTIFIED.

Q CAPTAIN WILLIAMS, HOW MANY INMATES WERE IN CELL 3-A-7 WHEN THIS SHOOK DOWN TOOK PLACE ON AUGUST THE 19TH?

[1721] A THERE ARE THREE.

Q AND HOW LARGE WAS THAT CELL?

A THAT CELL IS EIGHT BY TWELVE FEET.

Q IT'S EIGHT BY TWELVE OR EIGHT BY TEN?

A EIGHT BY TWELVE, SIR. EIGHT BY TWELVE, YES, SIR.

Q NOW, AS A PART OF YOUR PREPARATION FOR YOUR TESTIMONY HERE TODAY, DID I ASK YOU TO COME IN THE COURTROOM AND TAKE MEASUREMENTS?

A YES, SIR, YOU DID.

Q IF YOU COULD STEP DOWN?

A (WITNESS COMPLIES.)

Q FROM THE WALL BEHIND THOSE JURORS OUT TO THIS POINT, ABOUT HOW FAR IS THAT?

A ABOUT SEVEN AND A HALF FEET.

Q SO WHERE WOULD EIGHT FEET BE?

A RIGHT ABOUT HERE (INDICATES).

Q AND IF YOU WOULD, TAKE THIS INTO YOUR HANDS?

A (WITNESS COMPLIES.)

Q AND SHOW THE LENGTH THAT THAT CELL WOULD BE?

A BE RIGHT HERE (INDICATES).

Q SO THAT WOULD BE THE SIZE OF THE CELL THAT THOSE THREE INMATES WERE IN?

A YES, SIR, EIGHT BY TWELVE.

Q FROM THIS POINT, THAT'S THE WALL BEHIND THE JURORS, FROM THIS POINT –

[1722] A TO RIGHT HERE (INDICATES).

Q – DOWN TO RIGHT THERE (INDICATES)?

A THAT'S CORRECT.

Q THANK YOU.

CAPTAIN WILLIAMS, YOU WERE ALSO ASKED TO RESEARCH IN YOUR RECORDS TO SEE HOW LONG PRIOR TO AUGUST THE 19TH, 1998, WILLIAM ARTHUR KELLY HAD BEEN IN CELL 3-A-7?

A YES, SIR.

Q WHEN WAS HE ACTUALLY MOVED INTO THAT CELL?

A MR. KELLY WAS MOVED IN THAT CELL ON THE 26TH DAY OF APRIL OF '98.

Q SOME SIX MONTHS PRIOR ALMOST?

A YES, SIR.

Q IF I COULD ASK YOU THIS. WHEN YOU ARE AT THE CINDER BLOCK IN CELL 3-A-7 ON THAT

REAR WALL WHERE THAT MORTAR HAD BEEN REMOVED, WHAT'S BEHIND THAT WALL?

A THERE'S A SLIGHT LAYER OF MORTAR AND THEN A RED TILE THAT BASICALLY COVERS THE WHOLE BUILDING FROM THE OUTSIDE, A DECORATIVE TILE.

Q HOW FAR IS IT FROM THE INSIDE OF THAT WALL TO THE EXTERIOR OF THAT RED TILE THAT YOU HAVE JUST DESCRIBED?

A APPROXIMATELY NINE INCHES. YOUR CONCRETE BLOCK IS EIGHT. THERE'S A FINE LAYER OF MORTAR AND THEN THE RED BRICK IS STUCK TO THE OUTSIDE OF THAT WHICH IS APPROXIMATELY AN INCH.

[1723] Q AND APPROXIMATELY HOW FAR WERE SOME OF THE DIGGINGS ON THE MORTAR IN THIS CASE?

A SIX INCHES.

Q OVER TWO-THIRDS OF THE WAY THROUGH THAT WALL?

A YES, SIR.

Q CAPTAIN WILLIAMS, WHAT'S OUTSIDE THAT WALL? IF YOU REMOVE THAT BRICK OR THAT CINDER BLOCK, WHAT'S ON THE OTHER SIDE OF THAT WALL?

A THE RECREATIONAL YARD.

Q AND THAT'S IN THE OUT DOOR – YOU ARE OUTSIDE THAT BUILDING?

A YOU ARE OUTSIDE THE BUILDING AT THAT TIME, YES, SIR.

Q THANK YOU.

[1728] **FELIX E. WILLIAMS – CROSS BY MR. KIRKLAND**

* * *

Q OKAY. SO WE CAN KIND OF REFRESH. AND YOU WOULD AGREE WITH ME THERE'S SORT OF A CODE AMONGST INMATES ABOUT TELLING ON OTHER INMATES, ISN'T THERE?

A THERE IS.

Q AND IF YOU WERE TO TELL ON ANOTHER INMATE – WELL, LET ME BACK UP A LITTLE BIT. LET ME SORT OF SEE IF CAN SORT OF PAINT THIS PICTURE. WE ARE TALKING ABOUT THE THIRD FLOOR, CORRECT?

A THIRD FLOOR.

[1729] Q HOW MANY INMATES ON THAT FLOOR?

A 102.

Q 102. AND IS IT ABOUT THREE PER CELL, SOMETIMES MORE?

A THERE IS ALWAYS THREE PER CELL.

Q OKAY. AND IF AN INMATE IN YOUR EXPERIENCE WERE TO TELL ON ANOTHER INMATE FOR

SOMETHING THEY WERE DOING, WHAT HAVE YOU EVER NOTICED HAPPENING TO AN INMATE?

A WE BASICALLY MOVE THAT INMATE MOST OF THE TIME.

Q AND WHY DO YOU DO THAT?

A TO AVOID A PROBLEM.

Q WHY DO YOU DO THAT?

A TO AVOID A PROBLEM.

AND WHAT KIND OF PROBLEM ARE WE TALKING ABOUT?

A BUT IT DOES HAPPEN. THE INMATE MAY BE HURT. ANY NUMBER OF THINGS THAT CAN HAPPEN. HE MAY BE CHASTISED, BUT THAT'S - YOU KNOW, THAT HAPPENS QUITE OFTEN.

Q SO INMATES BASICALLY KNOW IF THEY WANT TO STAY IN GOOD GRACES, THEY KEEP THEIR MOUTHS SHUT, DON'T THEY?

A NO, I WOULD DISAGREE WITH THAT.

Q THEY WANT TO STAY IN GOOD GRACES WITH THE OTHER INMATES?

A I'D STILL DISAGREE WITH THAT. I HAVE INMATES THAT WRITE ME, TALK TO ME, AS WELL AS TO MY OFFICERS ALL THE TIME ABOUT A PROBLEM.

AS A MATTER OF FACT, THE LAST ESCAPE ATTEMPT WAS [1730] BROUGHT TO OUR ATTENTION BY ANOTHER INMATE.

Q NOW - AND THAT MAY - I BELIEVE YOU THAT SOME INMATES DO COMMUNICATE WITH YOU, BUT YOU STILL WOULD AGREE THAT IF AN INMATE DOES BRING SOMETHING OR RATS ANOTHER INMATE OUT, THERE COULD BE RETRIBUTION IN THAT?

A THERE COULD BE.

Q IT'S NOT UNCOMMON?

A YES, THERE COULD BE?

[1733] **MATTHEW MCCORMACK - DIRECT BY MR. HUMPHRIES**

* * *

THE WITNESS: MY NAME IS MATTHEW MCCORMACK. LAST NAME M-C-C-O-R-M-A-C-K.

DIRECT EXAMINATION

BY MR. HUMPHRIES:

Q MR. MCCORMACK, I THINK YOU'RE FIND IF YOU KEEP YOUR VOICE UP, BUT STAY SEATED BACK, THIS JURY WILL BE ABLE TO HEAR YOU. YOU JUST NEED TO KEEP YOUR VOICE UP.

A ALL RIGHT.

Q MR. MCCORMACK, YOU ARE WEARING AN ORANGE JUMPSUIT. WHERE DO YOU PRESENTLY RESIDE?

A RIGHT NOW I'M AT THE LEXINGTON COUNTY DETENTION CENTER.

Q WHERE IS YOUR MORE PERMANENT RESIDENCE?

A I'M AT A FEDERAL INSTITUTION IN PETERSBURG, VIRGINIA.

Q ARE YOU PRESENTLY SERVING A FEDERAL SENTENCE IN THAT INSTITUTION?

A YES, SIR.

Q DO YOU HAVE ANY PENDING CHARGES, EITHER STATE OR [1734] FEDERAL, TO YOUR KNOWLEDGE?

A NO, SIR.

Q YOUR PRESENCE HERE TODAY, WAS IT VOLUNTARY?

A YES.

Q WERE YOU BROUGHT HERE BY A FEDERAL WRIT TO TESTIFY?

A YES.

Q LET'S DISCUSS THIS. IN RETURN FOR YOUR TESTIMONY TODAY, WHAT, IF ANYTHING, HAS THE ELEVENTH CIRCUIT SOLICITOR'S OFFICE OR ANY AGENCY, LAW ENFORCEMENT AGENCY IN THE JURISDICTION PROMISED YOU FOR YOUR TESTIMONY?

A I HAVE RECEIVED NO PROMISES.

Q WHAT INSTRUCTIONS HAVE YOU RECEIVED FROM THIS OFFICE REGARDING YOUR TESTIMONY TODAY?

A BASICALLY, TO TELL ABOUT MY CORRESPONDENCE WITH MR. KELLY.

Q MR. MCCORMACK, DID YOU HAVE AN OCCASION TO BE HOUSED OR CELLED WITH THE DEFENDANT, WILLIAM ARTHUR KELLY, IN THE LEXINGTON COUNTY DETENTION CENTER?

A YES, SIR.

Q AND FOR A PERIOD OF APPROXIMATELY HOW LONG?

A IT WAS ON TWO SEPARATE OCCASIONS. APPROXIMATELY SIX MONTHS ALTOGETHER.

Q NOW, WE HAVE HAD PREVIOUS TESTIMONY REGARDING THE CELLS, THEIR APPROXIMATE DIMENSIONS. ARE THESE LARGE CELLS OR SMALL CELLS?

[1735] A FAIRLY SMALL. I GUESS SIX BY NINE.

Q YOUR RELATIONSHIP THEN WITH MR. KELLY, IT WAS – YOU ARE PRETTY CLOSE IN PHYSICAL PROXIMITY, HOW DID YOU GET ALONG OTHERWISE?

A PRETTY GOOD, PRETTY GOOD.

Q DID YOU AND THE DEFENDANT KELLY ENGAGE IN CONVERSATION ON A REGULAR BASIS?

A YES.

Q DID YOU HAVE A LOT OF OPPORTUNITY TO DO THAT?

A YES.

Q DID THERE COME A TIME OR A NUMBER OF TIMES THAT THE DEFENDANT KELLY TALKED TO YOU ABOUT HIS PENDING CHARGES OR THEY WERE PENDING AT THAT TIME?

A YES, SIR.

Q MR. MCCORMACK, TELL THIS JURY WHAT WILLIAM ARTHUR KELLY TOLD YOU REGARDING THE INCIDENT ON MAY 5TH 1996; THAT IS, THE STABBING AND KILLING OF SHIRLEY SHEALY?

A OKAY. WELL, FIRST OF ALL, HE – MR. KELLY TOLD ME THAT HE HAD WORKED SOMETIME AT KENTUCKY FRIED CHICKEN AND –

MR. KIRKLAND: COULD WE ASK HIM TO SPEAK UP, PLEASE?

THE COURT: IF YOU WOULD, SPEAK UP JUST A LITTLE BIT, PLEASE. IF YOU'LL JUST SPEAK IN A LOUDER VOICE, THE MICROPHONE WILL PICK YOU UP.

[1736] THE WITNESS: ALL RIGHT.

I WAS SAYING ME AND – MR. KELLY TOLD ME THAT HE WORKED AT KENTUCKY FRIED CHICKEN FOR QUITE SOME TIME WITH THIS LADY AND – WHICH WAS THE MANAGER. AND HE TOLD ME THAT THEY HAD NOT A RELATIONSHIP – NOT A PREVIOUS RELATIONSHIP BUT SOMETHING TO

THAT EXTENT TO WHERE, I GUESS, SHE MIGHT HAVE LIKED HIM AT ONE TIME, BUT IT WASN'T – IT WASN'T MUTUAL ON HIS SIDE. AND THEY – HE TOLD – MR. KELLY TOLD ME THAT THEY HAD PLANNED TO STAGE A ROBBERY AT THIS – AT KENTUCKY FRIED CHICKEN.

Q HE AND THE MANAGER?

A YES. AND TOLD ME THAT THEY PLANNED THIS ROBBERY SO THAT HE WOULD COME, TAKE THE MONEY AND THEN FLEE WHILE THIS LADY CALLED THE POLICE AND, YOU KNOW, TOLD THAT THERE WAS A ROBBERY.

Q WHAT ELSE DID HE TELL YOU?

A AFTER THAT, HE TOLD ME HE WENT – WELL, DURING THIS ROBBERY, HE WENT AND RETRIEVED THE MONEY AND WHEN HE – ON HIS WAY LEAVING, HE WENT BACK FOR SOME REASON AND, I GUESS, HE OVERHEARD THIS LADY ON THE TELEPHONE AND SHE WAS HAVING A CONVERSATION TO WHERE HE GOT THE POINT ACROSS THAT SHE WAS TURNING ON HIM. SHE WAS, YOU KNOW, TURNING HIM IN, YOU KNOW, FOR TAKING THE MONEY AND YOU KNOW NOT SAYING THAT SHE HAD ANYTHING TO DO WITH IT, YOU KNOW. AND SO, BEST I CAN REMEMBER, HE TOLD ME THEN AND THAT'S WHEN HE WENT AND [1737] RETRIEVED A KNIFE THAT BELONGED TO HIM. HE TOLD ME HE HAD COLLECTED CERTAIN TYPES OF KNIVES.

Q HE SAID HE COLLECTED CERTAIN KNIVES?

A YES, SIR.

Q DID HE DESCRIBE THIS PARTICULAR KNIFE?

A HE JUST – THE WAY HE DESCRIBED IT TO ME WAS SORT OF LIKE A BOWING KNIFE, LIKE A, YOU KNOW, SORT OF A HUNTING KNIFE.

Q DID HE DESCRIBE ANYTHING ABOUT THE CHARACTERISTICS OR THE WAY THE KNIFE WAS MADE?

A HE TOLD ME THAT THERE WAS A BLADE SIDE TO THE KNIFE AND ALSO A SIDE WITH SORT OF LIKE A SAW.

Q SHOW YOU STATE'S EXHIBIT NUMBER 43. IS THAT CONSISTENT WITH THE DESCRIPTION HE GAVE YOU REGARDING THE BLADE PARTICULARLY? THE SAWED EDGE AND THE BLADE EDGE?

A YES, SIR.

Q WHAT ELSE DID HE TELL YOU.

A HE TOLD ME RIGHT THEN AND THERE THAT WHEN HE OVERHEARD THIS CONVERSATION THIS IS WHEN HE WENT AND GOT THE KNIFE AND HE CAME BACK AND, I GUESS, THIS LADY SAW HIM COMING IN AT THIS POINT AND SHE HAD KNOWN THAT HE OVERHEARD THE CONVERSATION, I GUESS, BECAUSE MAYBE SHE SAW THE KNIFE IN HIS HAND, BUT SHE REMAINED SEATED IN THE CHAIR. AND AT THAT POINT, MR. KELLY POSITIONED HIMSELF BEHIND THIS LADY AND CUT HER THROAT.

[1738] Q DID HE DESCRIBE TO YOU – IN FACT, DID HE SHOW YOU THE MANNER IN WHICH HE CUT HER THROAT?

A YES, SIR. HE SAID THAT HE CUT HER THROAT ONE TIME AND THAT SHE – IT DIDN'T KILL HER AUTOMATICALLY, SO HE SORT OF TURNED THE KNIFE AROUND TO THE SAWED PART AND MADE A SAWING MOTION. LITERALLY, YOU KNOW, TRYING TO DECAPITATE THIS WOMAN.

Q CUT HER HEAD OFF?

A YES.

Q WHAT ELSE DID HE TELL YOU?

A AT THAT POINT, HE SAID THAT HE TURNED TO LEAVE OUT OF, I GUESS, THE OFFICE OF THIS ESTABLISHMENT AND HE RECOGNIZED AN OFFICER, A POLICE OFFICER COMING THROUGH THE FRONT DOOR OF KENTUCKY FRIED CHICKEN. WHEN HE SEEN THIS POLICE OFFICER, THE POLICE OFFICER – HE SAID THE POLICE OFFICER DIDN'T SEE HIM AND DIDN'T KNOW THAT HE WAS PRESENT. AND SO MR. KELLY SAID THEN THAT HE JUMPED OUT OF THE – THE DRIVE-THRU WINDOW OF THIS ESTABLISHMENT.

Q DID HE SAY WHERE HE WENT AFTER HE GOT OUT OF THE DRIVE-THRU WINDOW?

A TO MY KNOWLEDGE, HE TOLD ME THAT HE WENT STRAIGHT TO HIS CAR.

Q DID HE INDICATE TO YOU WHERE HIS CAR WAS PARKED?

A I BELIEVE IT WAS BEHIND THE KENTUCKY FRIED CHICKEN NEXT TO A DUMPSTER OR SOMETHING.

[1739] Q A DUMPSTER?

A YES.

Q DID HE TELL YOU WHAT HE DID AFTER HE WENT THROUGH THE DRIVE-THRU WINDOW AND TO HIS CAR?

A HE SAID THEN THAT HE PROCEEDED TO LEAVE – LEAVE TOWN AND THAT HE WENT TO SOUTH OF THE BORDER WHICH IS – I'M PRETTY SURE Y'ALL ARE FAMILIAR WITH WHAT THAT IS. HE SAID THAT HE SPENT THE NIGHT IN A HOTEL AT SOUTH OF THE BORDER AND FROM WHAT I GATHERED, HE TOLD ME HE ONLY SPENT ONE NIGHT AT SOUTH OF THE BORDER AND THEN THE DAY AFTER, HE DROVE STRAIGHT TO A RELATIVE'S HOUSE IN MASSACHUSETTS.

Q NOW, WAS THAT THE ONLY TIME YOU AND MR. KELLY DISCUSSED THAT PARTICULAR INCIDENT?

A NO.

Q HOW FREQUENTLY WOULD YOU SAY, MR. MCCORMACK, DID MR. KELLY DISCUSS THAT INCIDENT AND HIS INVOLVEMENT IN THAT INCIDENT?

A UH – INFREQUENTLY. YOU KNOW, SITTING IN THE CELL TOGETHER FOR SUCH A LONG TIME, I – YOU KNOW, WE RUN OUT OF THINGS TO TALK ABOUT AND SO SOMETIMES HE WOULD START TALKING ABOUT THE INCIDENT. SO WE TALKED ABOUT IT PRETTY MUCH VERY MUCH TO WHERE, YOU KNOW, I GATHERED ALL THIS INFORMATION,

YOU KNOW, AND WAS ABLE TO REMEMBER, YOU KNOW, IT THE WAY HE TOLD ME.

Q MR. MCCORMACK, DID YOU TALK ABOUT ANYTHING ELSE THAT [1740] YOU THOUGHT SIGNIFICANT WHILE IN THE CELL?

A AS FAR AS –

Q WHAT ABOUT JAIL LIFE? DID YOU TALK ABOUT JAIL LIFE?

A YES. YES. I WAS – I'VE BEEN IN AND OUT OF PRISON SINCE I'VE BEEN 17-YEARS-OLD AND HE KNOWS THIS AND HE SORT OF CONFIDED IN ME OVER THIS BECAUSE HE KNEW – HE KNEW THAT HE WOULD MOST LIKELY END UP DOING A GOOD, YOU KNOW, PART OF THE REST OF HIS LIFE –

MR. KIRKLAND: YOUR HONOR, I'M HAVING A HARD TIME HEARING.

THE COURT: IF YOU WOULD, SPEAK UP JUST A LITTLE BIT LOUDER, PLEASE, MR. MCCORMACK.

THE WITNESS: HE SAID THAT HE —NO, HE KNEW THAT HE WOULD BE DOING PRETTY MUCH THE REST OF HIS LIFE IN PRISON, SO HE CONFIDED IN ME AND PRETTY MUCH WANTED TO KNOW HOW PRISON LIFE WAS, HOW HE SHOULD CARRY HIMSELF. YOU KNOW, WANTED TO KNOW HOW LIFE WAS IN GENERAL IN A VIOLENT PRISON POPULATION.

Q LET ME ASK YOU THIS. DID YOU ACT ALONG THE LINES OF A MENTOR FOR MR. KELLY?

A YES, SIR. THAT'S WHAT –

Q IN THAT REGARD?

A YES, YES.

Q WELL, LET ME ASK YOU THIS. YOU ARE IN THE CELL PRETTY MUCH SEVEN-TWENTY-FOUR –

[1741] A YES.

Q – GIVE OR TAKE A FEW HOURS?

A YES.

Q DID YOU EVER TALK ABOUT ESCAPE?

A YES, WE DID.

Q WELL, LET ME ASK YOU THIS. NOW, IS THAT AN UNUSUAL TOPIC FOR INMATES THAT ARE CONFINED IN THAT MANNER TO TALK ABOUT?

A NO, NOT REALLY.

Q IS IT, HOWEVER, UNUSUAL FOR AN INMATE TO TAKE ACTIONS TO PUT AN ESCAPE PLAN INTO PLACE?

A IT'S –

Q MORE UNUSUAL THAN JUST TALKING?

A YES, YES, YES.

Q ABOUT HOW OFTEN DID MR. KELLY TALK ABOUT ESCAPING?

A UH – I WOULD SAY MAYBE – MAYBE FIVE TIMES. I – YOU KNOW, I CAN'T BE SURE EXACTLY HOW MANY TIMES, BUT IT WAS BROUGHT UP AT LEAST FIVE TIMES.

Q WELL, NOW, LET ME ASK YOU THIS. MR. MCCORMACK, HE WASN'T THE ONLY ONE ENGAGING IN THIS CONVERSATION, WAS HE?

A NO.

Q YOU WERE ENGAGING IN THE CONVERSATION AS WELL?

A YES, YES.

Q IN FACT, ISN'T IT TRUE THAT SOMETIMES BOTH OF YOU SORT OF PUT YOUR HEADS TOGETHER TO FIGURE OUT WHAT A GOOD [1742] ESCAPE PLAN MIGHT BE?

A YES.

Q NOW, THERE'S SOME TALK ABOUT ESCAPE. TELL THIS JURY IF WILLIAM ARTHUR KELLY EVER PUT ONE OF THOSE PLANS INTO ACTION?

A SOMEWHAT, YES.

Q TELL THE JURY ABOUT IT.

A MR. KELLY, HE MADE A SHANK ONE DAY AND THIS WAS – THIS IS A HOMEMADE KNIFE THAT HE MADE OUT OF A TOOTHBRUSH THAT HE SHARPENED UP ON ONE END.

Q WELL, LET ME ASK YOU THIS. YOU SAID HE MADE IT. DID YOU OBSERVE HIM MAKING THIS?

A YES.

Q HOW DID HE – IN WHAT MANNER DID HE MAKE THIS SHANK, AS YOU CALL IT?

A HE MADE IT SCRAPPING [sic] IT AGAINST CONCRETE IN ORDER FOR THE PLASTIC, YOU KNOW, TO SHARPEN ON THE TOOTHBRUSH.

Q WHILE WE ARE ON THE SUBJECT OF SHANKS, YOU ROOMED YOU SAID FOR A TOTAL OF ABOUT SIX MONTHS WITH MR. KELLY –

A YES, SIR.

Q – OVER THE COURSE OF TWO DIFFERENT TIMES, IS THAT RIGHT?

A YES.

Q IS THIS SHANK THE ONE THAT YOU DESCRIBED FOR THE JURY ON THAT INCIDENT THE ONLY SHANK THAT YOU OBSERVED IN THE [1743] POSSESSION OF WILLIAM ARTHUR KELLY?

A UH – AS FAR AS I KNOW. BECAUSE THERE WAS MORE THAN ONE THAT WAS MADE BECAUSE YOU CAN EASILY BUY A TOOTHBRUSH AND SCRAPE IT AND MAKE A SHANK.

Q OKAY. SO IT WASN'T THE ONLY ONE, BUT IT WAS ONE OF THEM?

A YEAH, TRUE. YES, YES.

Q OKAY. ALL RIGHT. PLEASE CONTINUE. I'M SORRY I INTERRUPTED YOU.

A OKAY. WE HAD AN OFFICER WORKING IN THE JAIL AT THAT TIME AND –

Q DO YOU RECALL HER NAME?

A HER NAME WAS MS. PRICE, MARSHA PRICE.

Q SHE WAS A CORRECTIONAL OFFICER?

A YES, SIR.

Q DESCRIBE HER STATUTE. THAT IS, HOW TALL SHE WAS, ABOUT HOW MUCH SHE MIGHT HAVE WEIGHED. TRY AND BE KIND.

A SHE WAS ABOUT APPROXIMATELY FIVE FOOT SEVEN, MAYBE A 130 POUNDS MAYBE.

Q OKAY. TELL THE JURY A LITTLE BIT ABOUT MS. PRICE AND HOW SHE WAS REGARDED BY YOU AND BY MR. KELLY IF YOU KNOW.

A SHE WAS REGARDED BY JUST ABOUT EVERY INMATE, INCLUDING MYSELF, TO BE A PUSHOVER IN THIS JAIL BECAUSE SHE WAS REALLY EASY TO GET OVER ON. IF ANYONE WOULD TRY TO ESCAPE, SHE WOULD BE THE MOST LIKELY PERSON TO TRY IT WITH, [1744] TO TRY TO TAKE HOSTAGE, THE MOST LIKELY PERSON.

Q TELL THE JURY ABOUT THAT EVENING.

A OKAY. ME AND MR. KELLY WERE IN THE ROOM THIS NIGHT AND HE HAD GOT FINISHED MAKING THIS SHANK OUT OF THIS TOOTHBRUSH AND WE WERE TALKING ABOUT DIFFERENT WAYS TO ESCAPE AND MR. KELLY WAS GOING THROUGH ONE OF HIS – ONE OF HIS PERIODS WHERE – ONE OF HIS PERIODS WHERE HE DIDN'T WANT TO BE IN THE CELL, YOU KNOW. SO, HE MADE A PLAN TO CALL MS. PRICE TO THE DOOR AND TAKE MS. PRICE HOSTAGE WITH THIS SHANK.

HE CALLED MS. PRICE TO THE DOOR AND MS. PRICE CAME TO THE DOOR. SHE OPENED THE DOOR AND MR. KELLY STOOD NEXT TO THE DOOR WITH THE SHANK OUT OF VIEW SO SHE COULDN'T SEE IT.

Q WAS IT IN HIS HAND?

A YES. AND HE THEN PROCEEDED TO STALL. HE ASKED HER – I DON'T KNOW MAYBE FOR SOME REGULAR THINGS WE ASK FOR. TOILET PAPER, TYLENOL, SOMETHING IN THAT NATURE. I COULDN'T REALLY HEAR. BUT SHE ENDED UP – SHE ENDED UP LEAVING AND HE ENDED UP BACKING OUT OF DOING IT AND THAT WAS PRETTY MUCH THE END OF IT.

Q NOW, TELL THE JURY WHAT YOU WERE DOING WHEN HE WAS STANDING THERE WITH A SHANK IN HIS HAND BEHIND THE DOOR?

A I WAS LAYING IN THE BUNK OR MY MATTRESS. WE HAVE BUNK BEDS IN THE ROOM AND IT WAS ONLY ME AND KELLY, BUT I [1745] CHOSE TO SLEEP ON THE FLOOR BECAUSE IT – YOU KNOW, WITH MY MATTRESS BECAUSE IT'S A LOT COOLER ON THE FLOOR AND IT'S A PART OF THE FLOOR WHERE THE AIR CONDITIONER HITS AND IT GETS VERY STUFFY WITHOUT ANY VENTILATION IN THAT ROOM HARDLY. AND SO I WAS LAYING THERE ON THE FLOOR ON THE MATTRESS WITH A CROSSWORD PUZZLE BOOK THAT BELONGED TO MR. KELLY AND I WAS JUST LOOKING AT HIM THE WHOLE TIME FROM HIS BACK SIDE THAT HE WAS DOING THIS.

Q WELL, NOW, MR. MCCORMACK, YOU DIDN'T ATTEMPT TO STOP DEFENDANT KELLY?

A I DIDN'T ATTEMPT TO STOP HIM, BUT I – WHAT WAS GOING THROUGH MY MIND IS THAT, YOU KNOW HOW WOULD THIS LOOK ON ME IF HE DID SOMETHING LIKE THAT AND WOULD I BE IMPLICATED AND I CLEARLY DIDN'T NEED THAT AT THIS TIME BECAUSE I WAS ON A STATE WRIT – I MEAN I WAS ON A FEDERAL WRIT HERE TO TESTIFY ON AN INCIDENT THAT HAPPENED REGARDING AN OFFICER BEING TAKEN HOSTAGE.

SO IF MR. KELLY WOULD HAVE DONE THAT, IT WOULDN'T HAVE LOOKED VERY GOOD ON MY PART. SOME EYEBROWS WOULD HAVE BEEN RAISED.

SO I CONTEMPLATED WHAT I SHOULD DO. YOU KNOW, SHOULD I TRY TO – SHOULD I TRY TO GRAB HIM AND STOP HIM FROM DOING THIS, BUT, YOU KNOW, I THOUGHT ABOUT IT AND I, LIKE I TOLD YOU, MR. KELLY HAD CONFIDED IN ME AND I PRETTY MUCH FELT LIKE HIS MENTOR AND I TOLD HIM AND TOLD HIM THAT [1746] IT WOULDN'T WORK. HE WOULDN'T BE ABLE TO GET FAR AND IT WOULD JUST, YOU KNOW, MAKE THINGS WORSE ON HIMSELF.

Q YOU DIDN'T NECESSARILY TELL HIM NOT TO ATTEMPT TO ESCAPE. YOU TOLD HIM THAT THAT PARTICULAR PLAN WAS NOT A GOOD ONE?

A THAT'S RIGHT.

Q NOW, MR. MCCORMACK, WITHOUT TRYING TO BE REAL FLIPPANT, IF I WERE TO CHARACTERIZE

YOUR PRIOR RECORD, YOUR PRIOR CRIMINAL RECORD AND I SAID IT WAS AS LONG AS BOTH OF YOUR TATTOOED ARMS, THAT WOULD BE A PRETTY FAIR STATEMENT, WOULDN'T IT?

A YES, YES.

Q THIS INFORMATION YOU PROVIDED TO THE JURY TODAY, DID I TELL YOU ABOUT IT OR DID YOU TELL ME ABOUT IT?

A I TOLD YOU TODAY.

Q WHAT DID I TELL YOU THAT I ABSOLUTELY REQUIRED REGARDING YOUR TESTIMONY TO THIS JURY TODAY?

A UH – EXCUSE ME?

Q DID I TELL YOU TO TELL THE TRUTH TO THIS JURY –

A OF COURSE.

MR. KIRKLAND: OBJECTION, YOUR HONOR. I DON'T THINK THAT'S A PROPER QUESTION. BOLSTERING HIS TESTIMONY, MAKING HIMSELF A WITNESS.

THE COURT: OVERRULED.

MR. HUMPHRIES: WHAT DID I TELL YOU REGARDING [1747] YOUR TESTIMONY TO THIS JURY TODAY? THE ONLY THING THE STATE WANTED FROM YOUR TESTIMONY WAS WHAT?

THE WITNESS: THE TRUTH.

Q MR. MCCORMACK, I'VE GOT ONE OTHER THING. DEFENDANT KELLY HE USED TO CARRY A

CUP AROUND WITH HIM IN THE DETENTION CENTER?

A YES, SIR.

Q DID YOU EVER GET A REAL GOOD LOOK AT THAT CUP?

A YES, SIR, I DID.

Q TELL THAT JURY WHAT WAS ON THAT CUP.

A THIS CUP WAS A STYROFOAM CUP APPROXIMATELY THIS BIG (INDICATES) AND IT'S WHITE AND THE STYROFOAM CUP HAD DRAWINGS ON IT THAT MR. KELLY MADE WITH A PEN DEPICTING, I THINK, WHAT I REMEMBER IS A MAN HOLDING A KNIFE CUTTING OFF A CHICKEN HEAD AND – LIKE A COMIC STRIP, SOMETHING TO THAT NATURE AND THERE WAS, YOU KNOW, WORDS ALONG WITH THIS COMIC STRIP THAT I CAN'T REMEMBER, BUT THAT'S BASICALLY IT.

Q THAT WAS HIS PERSONAL CUP?

A YES.

Q HAD THAT CUP FOR MORE THAN A DAY OR SO, WOULD YOU SAY?

A OH, YES, YES.

Q ANSWER ANY QUESTIONS THEY MAY HAVE.

[1756] **MATTHEW MCCORMACK – CROSS**
BY MR. KIRKLAND

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Q AND YOU KNOW THAT 90 PERCENT OF THE PEOPLE IN PRISON CAN WHIP HIS TAIL, DON'T YOU?

A NO, NOT 90 PERCENT.

Q WELL, HE WOULD BE FRESH MEAT, WOULDN'T HE?

A WELL, I MEAN, EVERYBODY – EVERYBODY THAT COMES IN IS PRETTY MUCH CONSIDERED AT CERTAIN INSTITUTIONS – YOU KNOW, ANYBODY THAT COMES IN AND ACTS A CERTAIN WAY – IN PRISON, IT'S NOT LIKE ON THE STREET WHERE YOU GO TO A BAR AND YOU SEE A BIG GUY AND YOU SAY, WELL, I DON'T WANT TO MESS WITH HIM, HE'S BIG. IT'S NOT LIKE THAT IN PRISON ANYMORE [1757] BECAUSE SMALL GUYS HAVE JUST AS – JUST AS MUCH HEART. AND I'VE SEEN THIS. I'VE SEEN GUYS SMALLER THAN WILLIAM KELLY BEAT UP GUYS BIGGER THAN YOU.

Q THAT'S RIGHT. AND YOU'VE GOT TO SHOW YOU'VE GOT A HEART? YOU'VE GOT TO SHOW YOU'RE TOUGH OR ELSE PEOPLE TAKE ADVANTAGE OF YOU, DON'T THEY?

A WHEN THAT TIME COMES, YES.

Q THAT'S RIGHT. YOU'VE GOT TO STAND YOUR GROUND?

A AND THE MAIN REASON FOR THAT IS THAT IF YOU LET SOMEBODY WALK ALL OVER YOU AND THEY – OTHER PEOPLE SEE THAT, THEN EVERYBODY WILL DO THE SAME THING.

Q THAT'S RIGHT. AND YOU LIVE WITH THAT EVERY SINGLE DAY OF YOUR LIFE IN A PRISON. NIGHT AND DAY YOU LIVE WITH THAT ANXIETY, DON'T YOU, THAT SOMEBODY IS GOING TO COME FOR YOU?

A YES. IT IS A LOT OF ANXIETY. WELL, NOT FOR ME PARTICULARLY, AND – WELL, NOT FOR A LOT OF PEOPLE REALLY WHERE I'M AT BECAUSE IF YOU KNOW HOW TO CARRY YOURSELF, THEN – AND YOU DON'T HAVE TO CARRY YOURSELF ALL TOUGH BECAUSE REALLY THE ONES THAT CARRY THEMSELVES TOUGH ARE THE ONES THAT GET GOT FIRST. YOU HAVE TO JUST CARRY YOURSELF LIKE YOU HAVE A HEAD ON YOUR SHOULDERS AND YOU'RE NOT GOING TO BE PUSHED AROUND.

Q BUT YOU TOLD BILLY KELLY ENOUGH ABOUT PRISON WHERE HE DECIDED HE'D RATHER DIE, RIGHT?

[1758] A I TOLD HIM THAT IF IT WAS MY DECISION, ME, PERSONALLY, THAT I WOULD RATHER SIT IN DEATH ROW FOR TEN YEARS AND GO AHEAD AND BE PUT TO DEATH THAN TO SPEND MY NATURAL LIFE IN PRISON, YES.

———

[1759] **MATTHEW MCCORMACK – RE-CROSS BY MR. KIRKLAND**

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Q MR. MCCORMACK, YOU TALKED [SIC] MR. KELLY HOW TO CARRY HIMSELF SO HE WOULDN'T HAVE TROUBLE, DIDN'T YOU?

A THAT'S RIGHT.

Q THANK YOU.

THE COURT: ANYTHING ELSE.

MR. KIRKLAND: I HAVE ONE MORE QUESTION.

RECROSS EXAMINATION

BY MR. KIRKLAND:

Q YOU TAUGHT HIM BECAUSE HE DOESN'T KNOW HOW TO CARRY HIMSELF, DOES HE?

A I'VE SEEN MR. KELLY HANDLE HIMSELF.

Q HE'S LEARNING?

A YES.

Q IT'S A WHOLE NEW BALLGAME WHEN YOU GET OUT THERE IN THE POPULATION WITH THE REAL CONS, ISN'T IT?

A YES.

Q ALL RIGHT.

[1759] **MARK WHARTON – DIRECT BY MR. HUMPHRIES**

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MR. HUMPHRIES: THE STATE CALLS MARK WHARTON TO THE STAND, PLEASE.

MARK WHARTON,

[1760] FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME, SPELLING YOUR LAST, PLEASE.

THE WITNESS: MY NAME IS MARK WHARTON, W-H-A-R-T-O-N.

DIRECT EXAMINATION

BY MR. HUMPHRIES:

Q WITH WHOM ARE YOU EMPLOYED?

A LEXINGTON COUNTY DETENTION CENTER.

Q HOW LONG HAVE YOU BEEN SO EMPLOYED?

A SEVEN YEARS.

Q AND WHAT IS YOUR POSITION AT THE DETENTION CENTER?

A MASTER CORRECTIONAL OFFICER.

Q LET ME ASK YOU THIS. OFFICER WHARTON, DID YOU HAVE AN OCCASION ON MAY THE 1ST, 1997, TO COME INTO CONTACT WITH THE DEFENDANT, WILLIAM ARTHUR KELLY, SHORTLY AFTER AN INTERVIEW IN AN ATTORNEY ROOM?

A YES, I DID. HE WAS RETURNING FROM THE ATTORNEY'S ROOM. HE WAS PATTED DOWN AND CHECKING HIS CIGARETTE PACK –

Q NOW, WHO WAS DOING ALL OF THIS PATTING DOWN?

A I WAS.

Q IS THAT PROTOCOL AFTER YOU MEET WITH PEOPLE WHO COME FROM OUTSIDE THE JAIL?

A YES, SIR.

[1761] Q IS THAT SOMETHING THAT YOU USUALLY DO OR WERE YOU STANDING IN FOR SOME OTHER OFFICERS?

A I WAS STANDING IN FOR ANOTHER OFFICER.

Q YOU'RE A SUPERVISOR AND THAT TYPICALLY IS NOT WITHIN YOUR DUTIES, IS THAT CORRECT?

A CORRECT.

Q PATTING MR. KELLY DOWN, WHAT, IF ANYTHING, DID YOU DISCOVER ON HIS PERSON OR IN HIS EFFECTS?

A NOTHING ON HIS PERSON OTHER THAN IN HIS RIGHT POCKET, HE HAD A PACK OF CIGARETTES WHICH I CHECKED. I WAS NOT LOOKING FOR ANYTHING UNUSUAL. POSSIBLY ANOTHER BRAND OF CIGARETTES. THEY WERE ALLOWED GENERIC AND SOMETIMES THEY CAN SNEAK BRAND NAMES IN. LOOKING IN THE CIGARETTE

PACK, I FOUND A TOOTHBRUSH WITH A METAL OBJECT MELTED INTO IT.

Q THAT TYPE OF OBJECT IS TYPICALLY CALLED WHAT?

A A SHANK.

Q THIS OBJECT TO WHICH YOU REFER IS IT CAPABLE OF INFLICTING PHYSICAL HARM?

A YES, IT IS.

Q IS IT WHAT WE CALL CONTRABAND?

A YES, SIR.

Q WHAT DID YOU DO AS A RESULT OF TAKING THAT SHANK FROM MR. KELLY?

A I INFORMED KELLY THAT HE WAS ON CONFINEMENT AND HIS ITEMS WERE TAKEN THAT ARE NOT ALLOWED WHILE YOU ARE ON [1762] CONFINEMENT AND HE WAS PLACED IN A CONFINEMENT ROOM.

Q NOW, CONFINEMENT, THAT'S THE HARSHEST SANCTION IN THE DETENTION CENTER, IS IT NOT?

A YES, IT IS.

Q AND FOR HOW LONG DID MR. KELLY STAY ON CONFINEMENT FOR THIS SHANK?

A HE HAD TO STAY ON TILL HE HAD HIS ADJUSTMENT HEARING, WHICH AT THAT TIME WAS EVERY WEDNESDAY. I WAS THERE. I DON'T REMEMBER WHO RAN THE ADJUSTMENT HEARING. I THINK HE WAS THERE FOR SEVEN DAYS TOTAL.

Q LET ME ASK YOU THIS. YOU WERE THERE AT THE ADJUSTMENT, WHICH I GUESS IS SOME SORT OF INFORMAL HEARING TO DETERMINE WHAT THE SANCTION SHOULD BE FOR THIS TYPE OF INCIDENT, IS THAT CORRECT?

A YES, IT IS.

Q DID MR. KELLY HAVE SOME EXPLANATION FOR WHY HE HAD THE SHANK IN HIS POSSESSION AS YOU RECALL?

A HE SAID IT WAS FOR HIS FINGERNAILS.

Q WELL, NOW, DO INMATES NOT HAVE ACCESS TO NAIL CLIPPERS AT THE DETENTION CENTER?

A YES, THEY DO. THEY CAN GO TO MEDICAL AND CAN REQUEST USING THEM THERE.

Q THANK YOU.

[1764] **MARK WHARTON - CROSS**
BY MR. KIRKLAND

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Q SO WE'RE TALKING ABOUT TWO AND A HALF YEARS. HE'S NEVER HURT ANYBODY? NO?

A NOT THAT I KNOW OF.

Q HE'S NEVER BEEN IN A FIGHT TO YOUR KNOWLEDGE?

A POSSIBLY, BUT NONE THAT I RECALL THAT I RESPONDED TO.

Q ALL YOU'VE EVER KNOWN IS HE MIGHT RUN HIS MOUTH FROM TIME TO TIME?

A YES.

Q INMATES DO THAT?

A YES, THEY DO.

Q THEY ALL DO, DON'T THAT [sic]?

A YES, THEY DO.

Q ALL RIGHT. AND THEY USE PROFANITY?

[1765] A YES, THEY DO.

Q I MEAN, THAT'S WHAT JAIL LIFE IS, ISN'T IT?

A YES, IT IS.

Q AND IT'S PRETTY TERRITORIAL, TOO. I MEAN, YOU HAVE TO WATCH YOURSELF AND WATCH YOUR FRIENDS, DON'T YOU?

A MORE IN PRISON. LITTLE BIT LESS IN JAIL, BUT, YES.

Q OKAY. EVEN MORE SO IN PRISON, ISN'T IT? AND INMATES SOMETIMES HAVE SHANKS JUST TO PROTECT THEMSELVES, DON'T THEY?

A YES, SIR.

Q I MEAN, YOU DON'T KNOW WHO IS BEHIND YOU, DO YOU?

A NO, SIR.

Q IT'S DOG EAT DOG IN THERE, ISN'T IT?

A YES, IT IS.

Q AND THE BIG DOG WINS?

A NOT NECESSARILY.

Q WELL, IF Y'ALL DON'T GET THEM FIRST, RIGHT?

A I WOULDN'T SAY THAT.

Q OKAY. WHAT WOULD YOU SAY?

A I SAY IT DEPENDS. A SMALL GUY CAN KNOCK A BIG GUY DOWN.

[1767] **EDWARD D. BRYANT – DIRECT BY MR. CHASE**

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MR. CHASE: PLEASE THE COURT, YOUR HONOR. THE STATE CALLS DEWAYNE BRYANT TO THE STAND.

EDWARD D. BRYANT,
[1768] FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME, SPELLING YOUR LAST.

THE WITNESS: EDWARD D. BRYANT, B-R-Y-A-N-T.

DIRECT EXAMINATION

BY MR. CHASE:

Q MR. BRYANT, WHERE DO YOU LIVE?

A LEXINGTON.

Q HOW LONG HAVE YOU LIVED IN LEXINGTON COUNTY?

A ABOUT THREE YEARS NOW.

Q ARE YOU WORKING?

A YES, SIR.

Q WHERE ARE YOU WORKING?

A T AND J FENCE.

Q ABOUT HOW MANY HOURS A WEEK DO YOU WORK?

A I WORK ANYWHERE FROM 60 TO 65 HOURS A WEEK.

Q A FULL WEEK?

A YES, SIR.

Q MR. BRYANT, I JUST WANT TO GO AHEAD AND GET THIS OUT OF THE WAY. ARE YOU CURRENTLY ON PROBATION?

A YES, SIR.

Q WHAT ARE YOU ON PROBATION FOR?

A C.S.C.

Q DO YOU HAVE ANY PENDING CHARGES RIGHT NOW?

A NO, SIR.

[1769] Q NOW, PRIOR TO THE TIME THAT YOU WERE PLACED ON PROBATION, DID YOU - WERE YOU HOUSED OVER AT THE LEXINGTON COUNTY DETENTION CENTER?

A YES, SIR.

Q WHILE YOU WERE THERE, DID YOU EVER COME IN CONTACT BY A GUY - THE GUY BY THE NAME OF WILLIAM ARTHUR KELLY?

A YES, SIR.

Q WHERE WOULD YOU SEE WILLIAM ARTHUR KELLY?

A I WAS ON THE SAME WING HE WAS ON.

Q IF YOU ARE ON THE SAME WING WITH AN INMATE, DO YOU HAVE A LOT OF CONTACT WITH THEM?

A YES, EVERYDAY.

Q DO YOU HAVE THE OPPORTUNITY TO MINGLE WITH THEM?

A YES, SIR.

Q WHEN YOU ARE LET OUT OF YOUR CELL, YOU CAN MOVE AROUND AND BE WITH EACH OTHER?

A YES, SIR.

Q DID YOU EVER HEAR WILLIAM KELLY TALK ABOUT ESCAPING?

A YES, AT ONE TIME.

Q WHAT DID YOU HEAR WILLIAM ARTHUR KELLY TALK ABOUT?

A I JUST KIND OF OVERHEARD IT OUTSIDE OF HIS DOOR AROUND HIS CELL.

Q WHAT DID HE SAY?

A WELL, AT THAT TIME, HE WAS TALKING ABOUT TAKING A NURSE HOSTAGE.

[1770] Q TAKING A NURSE HOSTAGE?

A YES SIR.

Q DID YOU EVER SEE HIM AROUND OTHER INMATES?

A YES, SIR.

Q DID YOU EVER SEE HIM GET CONFRONTATIONAL WITH SOME OF THOSE INMATES?

A YES, A FEW OF THEM. YES, SIR.

Q WHAT WOULD HE DO?

A MOSTLY BE - IT'S EITHER WORDS OR A LITTLE SHOVING AND STUFF MOST OF THE TIME.

Q DURING THE TIME THAT YOU WERE ON THE SAME WING WITH MR. KELLY, DID YOU EVER HEAR HIM TALK ABOUT WHAT HE WAS CHARGED WITH DOING?

A YES, SIR, SEVERAL TIMES.

Q WHAT DID YOU HEAR WILLIAM ARTHUR KELLY SAY ABOUT THAT CRIME?

A MOST THE TIME WHEN I WAS AROUND, HE MOSTLY BE BRAGGING ABOUT IT.

Q DO YOU REMEMBER ANYTHING PARTICULAR THAT HE MIGHT HAVE SAID ABOUT THAT?

A YES. A FEW TIMES HE WOULD BE JOKING AROUND SAYING THE ONLY REASON HE DIDN'T CUT HER HEAD OFF BECAUSE HE COULDN'T GET THROUGH HER NECK BONE.

Q HE SAID THAT MORE THAN ONCE?

A YES, SIR.

[1771] Q COULDN'T GET THROUGH THE NECK BONE, THAT'S WHY HE DIDN'T CUT HER HEAD OFF?

A YES, SIR.

Q DID HE HAVE A NICKNAME ON THE FLOOR?

A YES, SIR. WELL, HE REQUESTED TO BE CALLED K.F.C.

Q K.F.C.?

A YES, SIR.

Q LIKE FOR KENTUCKY FRIED CHICKEN?

A YES, SIR.

Q LET ME ASK YOU THIS, MR. BRYANT, DID YOU EVER SEE MR. KELLY WITH A CUP WHILE HE WAS ON THE FLOOR?

A YES, SIR, I DID.

Q WHAT KIND OF CUP WAS THAT?

A IT WAS A WHITE STYROFOAM CUP. THEY HAVE LIKE A PROGRAM WHEN YOU GET THE BEST FLOOR, YOU GET POPCORN AND STUFF AT NIGHT AND IT WAS A POPCORN CUP. I'D SAY ABOUT A TWENTY-OUNCE CUP OR SOMETHING LIKE THAT.

Q DO YOU REMEMBER ANYTHING BEING ON THAT CUP?

A YES. THERE WAS A CHICKEN WITH HIS HEAD CUP [SIC] OFF WITH BLOOD DRIPPING OUT OF IT AND THERE WAS A KNIFE UP ABOVE IT AND THEN ON THE FRONT SIDE, IT HAD K.F.C. ON IT.

Q THANK YOU.

[1773] **EDWARD D. BRYANT – CROSS BY MR. KIRKLAND**

* * *

Q WHEN YOU FIRST COME INTO THE DETENTION CENTER, WOULD YOU AGREE WITH ME YOU'VE GOT TO KIND OF GET YOUR TURF AND GET SECURE IN WHERE YOU ARE AND POSITION YOURSELF WITH THE OTHER INMATES?

A YES, SIR.

Q THAT'S PRETTY COMMON, RIGHT?

A YES, SIR.

Q AND WOULD YOU ALSO AGREE WITH ME THAT YOU'VE GOT TO LET THE OTHER INMATES

KNOW YOU ARE TOUGH OR YOU CAN STAND YOUR GROUND?

A MOSTLY, YES, SIR.

Q AND ONE OF THE WAYS SOME INMATES DO THAT TO PROTECT THEMSELVES AND TO FEEL SECURE IS TO KIND OF SAY, LOOK WHAT I DID, DON'T MESS WITH ME, ISN'T THAT RIGHT?

A YES, SIR.

Q ALL RIGHT. BECAUSE IF YOU GO IN THERE AND PEOPLE DON'T THINK YOU'RE TOUGH, SOMEBODY IS GOING TO PICK ON YOU?

A YES, SIR.

Q THEY'RE GOING TO TEST YOU, RIGHT?

A YES, SIR.

Q THEY GOING TO PUSH YOU AS FAR AS THEY CAN, IS THAT RIGHT?

[1774] A YES, SIR.

Q SO IF YOU DON'T LET SOMEBODY KNOW YOU'RE A TOUGH DUDE, YOU MIGHT BE CLEANING THEIR SINK, CLEANING THEIR TOILET, WON'T YOU?

A YEAH.

Q YOU MIGHT BECOME THEIR BOYFRIEND, MIGHTN'T YOU?

A POSSIBLE.

Q SO BILLY KELLY LET PEOPLE KNOW WHAT HE DID?

A YES, SIR.

Q IT SCARED YOU, DIDN'T IT?

A YES, SIR, IT DID.

Q IT SCARED A LOT OF PEOPLE, DIDN'T IT?

A YEAH.

Q IT SERVED ITS PURPOSE, RIGHT?

A YES, SIR.

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[1781] **STEVEN M. DERRICK,**

BEING ALREADY DULY SWORN, RETURNED TO THE WITNESS STAND AND TESTIFIED AS FOLLOWS:

THE COURT: ALL RIGHT.

INSOFAR AS THE QUESTIONABLE OR THE OBJECTIONABLE PHOTOGRAPHS ARE CONCERNED, LET'S DEAL WITH THOSE.

[1782] THE SOLICITOR: YOUR HONOR, WITH THIS WITNESS, WE HAVE PHOTOGRAPHS – A GREAT NUMBER OF THEM MARKED IN EVIDENCE. I THINK THERE ARE QUESTIONS WITH SIX OF THEM AND THOSE NUMBERS ARE 73, 76, 75, 84, 89, 90, IS THAT CORRECT.

MS. FULLWOOD: THAT'S RIGHT.

YOUR HONOR, WE OBJECT TO THEM ON THE GROUNDS THAT THE POTENTIAL PREJUDICE IN THOSE PHOTOGRAPHS OUTWEIGHS ANY PROBATIVE VALUE THEY MIGHT HAVE.

THE COURT: ALL RIGHT.

SOLICITOR, YOU HAVE ANY ARGUMENT YOU WANT TO MAKE CONCERNING THESE PHOTOGRAPHS?

THE SOLICITOR: JUST TO CITE SOME CASES, YOUR HONOR. *STATE VERSUS KORNAHRENS* IS THE LEADING CASE AND I KNOW I DON'T NEED TO CITE THAT CASE FOR YOUR HONOR. YOU ARE MORE FAMILIAR WITH IT THAN ANY OF US ARE. WITHIN THAT, THE SUPREME COURT TALKED ABOUT DISPLAYING VARIOUS PHOTOGRAPHS. IN THIS CASE, IT WAS THREE BODIES THAT WERE IN A GRAVE THAT MR. KORNAHRENS HAD PUT THEM IN AFTER HE MURDERED THEM.

AND THE SUPREME COURT TALKED ABOUT THE PHOTOGRAPHS, THAT WHILE THEY ARE NOT ADMISSIBLE IN THE GUILT PHASE, THEY ARE PROPERLY ADMITTED IN THE PENALTY PHASE TO SHOW THE CHARACTER AND CHARACTERISTICS OF THE DEFENDANT, THE CIRCUMSTANCES SURROUNDING THE CRIME AND TO SHOW THE NATURE IN WHICH THE CRIME WAS COMMITTED.

* * *

[1784] THE SOLICITOR: AS AN OFFICER OF THE COURT, I CAN TELL YOUR HONOR THAT THESE PHOTOGRAPHS WILL BE NECESSARY TO ASSIST DR. SEXTON IN GIVING MORE DETAILED TESTIMONY AS TO THE WOUNDS. HE'S ALREADY TESTIFIED THAT THERE WERE OVER THIRTY-ONE OR APPROXIMATELY THIRTY-ONE STAB WOUNDS FROM VARIOUS

DIRECTIONS OF VARIOUS SIZES FROM THE FRONT TO THE [1785] NECK, TO THE HEAD, AND DOWN THE BACK, ALL THE WAY DOWN TO THE LOWER PART OF THE VICTIM'S BACK. AND THAT DID NOT INCLUDE THE SLICE WOUNDS TO THE NECK AND I THINK TO THE SIDE OF THE FACE. SO WE'VE GOTTEN WELL INTO THE – THESE WOULD BE ALSO, YOUR HONOR, HERE *STATE VERSUS POWERS* IS ANOTHER CASE IN WHICH ITS CITED FOR AUTOPSY CASES. FURTHER CASES OF *STATE VERSUS MIDDLETON, STATE VERSUS KORNAHRENS, STATE VERSUS FRANKLIN, STATE VERSUS LUKE WILLIAMS, STATE VERSUS RAYMOND PATTERSON, STATE VERSUS RAY* – WHICH I THINK YOU TRIED –

THE COURT: YES, SIR.

THE SOLICITOR: – AND *STATE VERSUS BENJI POWERS* SAID THAT WE HAVE PHOTOGRAPHS TO SHOW THE MANNER IN WHICH THE WOUNDS WERE INFLICTED, THE CHARACTERISTICS – THE CHARACTER OF THE DEFENDANT AND THE CIRCUMSTANCES SURROUNDING THE CRIME, THEN THEY WOULD BE ADMISSIBLE.

I CAN TELL YOUR HONOR. THAT WE HAVE TAKEN THOSE FROM A BUNCH OF PICTURES WE HAD. WE HAD SOME THAT WERE MUCH MORE OFFENSIVE THAN THOSE AND THOSE ARE THE ONES THAT WE WENT THROUGH AND SELECTED OUT OF MANY, MANY MORE.

WE SUBMIT THOSE ARE PROPER UNDER 403 AND THE CASE LAW TO SHOW THE CHARACTER, THE CHARACTERISTICS OF THE DEFENDANT, TO SHOW

THE MANNER IN WHICH THE CRIME WAS COMMITTED, AND ALSO MOST IMPORTANTLY OR AS EQUALLY IMPORTANT, UNDER *STATE VERSUS FRANKLIN* AND *STATE* [1786] *VERSUS ARD*, I BELIEVE IT WAS, IT GOES TO PROVE AGGRAVATING CIRCUMSTANCES, PARTICULARLY PHYSICAL TORTURE.

* * *

[1789] THE SOLICITOR: AND THE LAST THING WE HAVE, YOUR HONOR, THIS CONCERNS ITEMS ALREADY ADMITTED INTO EVIDENCE AND IT CONCERNS THE VICTIM'S SHIRT, PANTS, JACKET AND BRA. AND WHAT WE HAVE DONE IS PUT THIS ON A FIGURE WITHOUT ANY HEAD OR ANYTHING AND DR. SEXTON WILL USE THIS TO SHOW THE STAB WOUNDS THROUGH THE CLOTHING. ALL OF THESE ITEMS HAVE BEEN PUT INTO EVIDENCE. THE BRA AND THE JACKET ON HANGERS WHICH WILL BE TAKEN AWAY FROM IT AND THEN WHAT YOU HAVE IS HOW - BECAUSE WE COULDN'T - WE DIDN'T DEMONSTRATE THE SHIRT IN THE GUILT PHASE, WE HAD IT IN EVIDENCE, BUT TO SHOW HOW THE STABS WERE MADE WITH THE CLOTHES ON.

MS. FULLWOOD: YOUR HONOR -

THE COURT: YES, MA'AM.

MS. FULLWOOD: WE OBJECT. I THINK IT'S IRRELEVANT WHETHER OR NOT THESE ITEMS HAVE ALREADY BEEN PLACED IN EVIDENCE. I BELIEVE WE OBJECTED TO ENTRY OF EVERY EVIDENCE EXCEPT FOR THIS JACKET ANY WAY.

IN ANY EVENT, THEY HAVE BEEN ALTERED TO SET UP A [1790] DISPLAY. IT IS GORY. IT IS GRUESOME. DR. SEXTON HAS THIS TO EXPLAIN HIS TESTIMONY. HE HAS THE PHOTOGRAPHS TO EXPLAIN HIS TESTIMONY. THIS DOESN'T GO TO PROVE STATUTORY AGGRAVATING CIRCUMSTANCES. THIS DOESN'T GO TO PROVE CIRCUMSTANCES OF THE CRIME. THE ONLY THING, THE ONLY PURPOSE I COULD SEE IN PUTTING THIS INTO EVIDENCE IS TO SHOCK THE JURY. IT IS SHOCKING. IT IS GRUESOME. IT IS BLOODY. I THINK IT NEEDS TO BE EXCLUDED UNDER 403.

THE SOLICITOR: THAT'S WHY I DIDN'T DO IT IN THE GUILT PHASE. I PURPOSEFULLY KEPT IT AWAY IN THE GUILT PHASE. BUT IN THE PENALTY PHASE, I THINK, IT GOES TO THE MANNER IN WHICH THE CRIME WAS COMMITTED. THERE'S BEEN SOME CONTENTION ABOUT THIS JACKET BEING AROUND HER HANDS WHEN YOU'VE GOT STAB WOUNDS IN THE TOP OF THE JACKET UP HERE. YOU'VE GOT THE BRA THAT'S BEEN CUT. WE'VE GOT THIS SHIRT THAT SHE WAS WEARING WHEN SHE WAS STABBED. EVEN THE PANTS SHOW THE STAB MARKS. SO IT SHOWS THE COMMISSION OF THE CRIME, THE MANNER THE CRIME WAS COMMITTED. IT GOES TO THE PHYSICAL TORTURE ASPECT. IT GOES TO THE CHARACTERISTICS OF THE DEFENDANT.

No. 00-9280

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM ARTHUR KELLY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

JOINT APPENDIX
Volume II, Pages 156-345

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[1823] **DR. JOEL S. SEXTON – DIRECT BY MR. MYERS**

* * *

DR. JOEL S. SEXTON,

BEING ALREADY BEING DULY SWORN, RETURNED TO THE WITNESS STAND, AND TESTIFIED AS FOLLOWS:

THE COURT: LET ME REMIND YOU THAT YOU ARE STILL UNDER OATH, DR. SEXTON.

THE WITNESS: THANK YOU, YOUR HONOR.

DIRECT EXAMINATION

BY MR. MYERS:

Q DR. SEXTON, I WANT TO HAND YOU WHAT'S BEEN MARKED AS STATE'S EXHIBIT NUMBER 108, STATE EXHIBIT NUMBER 109.

A (WITNESS COMPLIES.)

Q YOU ARE LOOKING AT SOME SLIDES YOU TOOK AT THE AUTOPSY?

A THAT'S CORRECT. AND THESE ARE PHOTOGRAPHS THAT ARE CONSISTENT WITH THE SLIDES THAT I TOOK AT THE TIME OF THE AUTOPSY.

Q AND NUMBER 108, IS THAT SUBSTANTIALLY THE CONDITION THAT THE BODY WAS IN WHEN IT ARRIVED IN NEWBERRY AT YOUR OFFICE?

A YES, THAT'S CORRECT.

Q AND THEN 109, WOULD BE TURNING THE BODY OVER?

A YES, THAT'S CORRECT.

Q WHAT IS THAT ON THE STOMACH OF MS. SHEALY?

A THERE ARE TWO THINGS NOTED ON THE FRONT. ONE IS OUR [1824] LABEL WHICH HAS A NUMBER ON IT AND IT'S A RULER. THE OTHER ARE BLOODY DOLLAR BILLS THAT ARE ON THE FRONT OF THE PERSON. THEY ARE STUCK TO THE FRONT OF THE CLOTHING.

Q AND WAS THAT, I THINK, TESTIMONY BEING THE 102 DOLLARS THAT WAS REMOVED THAT WAS STUCK TO THE FRONT OF HER?

A YES, SIR, THAT'S CORRECT.

Q OKAY. NOW, WITH RESPECT TO THE CLOTHING, DOCTOR, DID Y'ALL REMOVE THE CLOTHING THERE, TOO?

A YES, WE DID.

Q WAS IT APPARENT THROUGH THE CLOTHING THAT THERE WERE CERTAIN STAB MARKS ON THE OUTSIDE?

A BEFORE WE REMOVED THE CLOTHING, WE EXAMINED THE BODY EXTERNALLY WITH THE CLOTHING IN PLACE AND THERE WERE APPARENT STAB HOLES THROUGH THE CLOTHING. PARTICULARLY, IN THE UPPER BACK OF THE CLOTHING

AND IN THE BACK OF THE PANTS THAT CORRESPONDED TO STAB HOLES IN THE BACK OF THE BODY.

THE OUTER GARMENT, THE JACKET, ONLY HAD A FEW STAB HOLES IN IT. IT DIDN'T HAVE – OBVIOUSLY, IT WAS NOT IN THE SAME LOCATION ON THE BACK OF THE BODY AT THE TIME THE MULTIPLE STAB WOUNDS WERE INFLICTED IN THE UPPER BACK.

Q REFERRING TO THE JACKET, CAN YOU POINT OUT ON THERE SOME OF THE STAB WOUNDS?

A MAY I STEP DOWN?

Q YES, SIR.

[1825] A (WITNESS COMPLIES.) THIS IS THE OUTER GARMENT THAT SHE WAS WEARING AND THERE'S A STAB WOUND HERE OR A STAB HOLE HERE AND HERE IN THE LEFT ARM AND THAT CORRESPONDED TO A HOLE IN THE BACK OF THE LEFT ARM.

HERE ON THE UPPER LEFT BACK IS A SINGLE LONG STAB HOLE THAT CORRESPONDED TO ONE OF THE STAB HOLES IN HER UPPER BACK. THERE WERE OTHER STAB HOLES IN THE BACK, BUT THIS IS THE ONLY ONE THAT WAS FOUND ON THE JACKET.

HERE ON THE LOWER LEFT OF THE JACKET IS A SINGLE STAB HOLE PLUS A V-SHAPED HOLE. THE JACKET WAS – AT THE TIME THAT WOUND WAS INFLICTED WAS FOLDED SO THAT THE WOUND WHEN IT WAS INFLICTED AS IT WENT THROUGH THE CLOTH, IT ALSO HIT A FOLD IN THE CLOTH

AND CAUSED THAT V-SHAPED HOLE THAT YOU SEE BESIDE THE ELONGATED HOLE. AND THIS ONE DID CORRESPOND TO A HOLE IN THE LOWER BACK. THOSE WERE THE ONLY STAB HOLES IN THE JACKET.

Q HANDING YOU THE SHIRT SHE WAS WEARING UNDER THE JACKET.

A THE SHIRT HAD MULTIPLE STAB HOLES SOME OF WHICH WERE, AS YOU SEE, QUITE LARGE INDICATING THAT THE KNIFE WENT IN AND THEN WAS DRAWN OUT IN A FASHION SUCH THAT THE SHARP EDGE CUT AN ADDITIONAL HOLE IN THE JACKET – OR I'M SORRY, IN THE SHIRT. AND YOU CAN SEE THERE ARE MULTIPLE HOLES HERE ALL ACROSS THE UPPER BACK OF THE SHIRT, STARTING OVER HERE AT THIS RIGHT SHOULDER AND GOING ALMOST ALL THE WAY [1826] ACROSS THE BACK.

THERE WAS A SMALL HOLE DOWN HERE THAT CORRESPONDED TO THE STAB WOUND IN THE LOWER BACK.

ON THE FRONT OF THE SHIRT, THERE'S A STAB WOUND OR STAB HOLE IN THE SHIRT HERE IN THE UPPER MID-CHEST CLOSE TO THE STERNUM AND THEN HERE ON THE RIGHT SIDE, THERE ARE FOUR STAB HOLES IN A ROW. ONE HERE JUST BELOW AND ACTUALLY ON THE SIDE OF THE RIGHT BREAST AND THEN THREE IN THE ABDOMINAL REGION. EVEN THOUGH THEY WENT THROUGH THE CARTILAGE AND THE RIB AREA, THAT PART OF YOUR RIB AREA COVERS YOUR LIVER AND PART OF YOUR ABDOMINAL ORGANS, SO EVEN THOUGH IT'S IN

PART OF THE CHEST REGION, IT WENT INTO THE LIVER AND THE ABDOMINAL CAVITY.

Q AND THIS WAS THE BRA THAT SHE WAS WEARING, DOCTOR, AND THERE'S ALSO CUT MARKS ON THE BRA?

A PRIMARILY ON THE BACK OF THE BRA, BUT HERE YOU CAN SEE ONE THAT I MENTIONED EARLIER WAS ON THE SIDE OF THE RIGHT BREAST. HERE ON THE BACK OF THE BRA WERE MULTIPLE STAB HOLES THAT INTERSECTED AND ANOTHER ONE HERE ON THE LEFT BACK. THERE WERE AT LEAST THREE OR FOUR THAT YOU CAN SEE HERE ON THE BACK OF THE BRA JUST ON THE THIN STRAP THAT WENT ACROSS AT THAT LOCATION.

Q AND THE PANTS?

A THE PANTS HAD ONE STAB HOLE HERE IN THE RIGHT BUTTOCKS THAT CORRESPONDED TO THE STAB WOUND IN THE RIGHT [1827] BUTTOCKS. AND THEN THIS ONE AT THE BELT LINE WHICH CORRESPONDED TO THE ONE IN THE LOWER BACK.

Q ON THIS PHOTOGRAPH 23, IS THAT THE STAB TO THE RIGHT – TO THE BUTTOCKS YOU WERE TALKING ABOUT?

A YES. THIS IS A PHOTOGRAPH OF THE DECEDENT AT THE SCENE AND YOU SEE THE STAB HOLE THROUGH THE CLOTHING IN THE BUTTOCKS REGION AND BLOOD IN THAT AREA.

Q THANK YOU, DOCTOR.

NOW, YOU HAVE TESTIFIED PREVIOUSLY ABOUT THERE BEING MOVEMENT DURING THE STABBING OF MS. SHEALY?

A THAT'S CORRECT.

Q AND VARIOUS ANGLES IN WHICH THE STAB WOUNDS WERE –

A THAT'S CORRECT. NOT ONLY A MOVEMENT OF THE CLOTHING SO THAT THE HOLES IN THE CLOTHING DO NOT ALWAYS CORRESPOND TO HOLES UNDERNEATH THEM, WHEREAS THE HOLES IN THE SKIN MIGHT BE CLOSER TOGETHER THAN THE HOLES IN THE CLOTHING INDICATING THE CLOTHING MOVED BETWEEN THE STAB WOUNDS. PLUS THE STAB WOUNDS ARE GOING IN AT DIFFERENT ANGLES INSTEAD OF A NUMBER OF THEM GOING IN EXACTLY THE SAME PARALLEL PATH WHICH WOULD SUGGEST THERE WAS NO MOVEMENT.

Q NOW, DR. SEXTON, HAVE YOU HELPED PREPARE AN EXHIBIT FOR US TO SHOW ALL THESE DIRECTIONS IN WHICH THE WOUNDS WENT IN AND THE VARIOUS PLACES ON THE BODY?

A YES, I HAVE.

Q WOULD THAT BE OF ASSISTANCE TO YOU IN EXPLAINING ALL [1828] OF THOSE TO THE JURY?

A YES, IT WOULD.

Q REFERRING TO 117, DOCTOR, LET'S TALK ABOUT THE BACK FIRST AND I'M GOING TO LET YOU GO OVER THIS ANY WAY YOU WANT TO.

A THIS IS A MODEL WHERE THE DIAGRAM THAT I DREW EARLIER WAS BLOWN UP ON POSTER PAPER AND THEN ATTACHED TO STYROFOAM SO THAT THE PROBES WOULD STAY IN PLACE.

THE PROBES THAT HAVE GREEN ENDS WERE THE FIVE FATAL STAB WOUNDS THAT ENTERED THE BACK OF THE BODY. AS YOU CAN SEE FROM THE WAY THESE GO IN, THEY'RE GOING IN AT DIFFERENT ANGLES, BOTH LEFT, RIGHT, UP AND DOWN. STARTING WITH THE ONE HERE ON THE BUTTOCKS THAT YOU SEE GOING FROM RIGHT TO LEFT. THE ONE IN THE LOWER BACK GOING UPWARD AND TO THE RIGHT. ALL OF THEM GO FORWARD, OBVIOUSLY. MANY OF THESE ON THE UPPER BACK GO DOWNWARD, BUT YOU CAN SEE SOME THAT ARE ACTUALLY GOING UPWARD AND THEY ARE GOING IN ANGLES TO THE LEFT AND RIGHT. SOME ARE VERY LONG. THIS IS ONE THAT PRODUCED TWO WOUNDS INSIDE THE BODY BECAUSE AS YOU CAN SEE, IT CAME IN ALONG ONE PATH AND THEN WENT OUT AND THEN BACK IN CREATING A SECOND PATH SUCH THAT THE LUNG WAS PENETRATED TWICE EVEN THOUGH THE SKIN WAS ONLY PENETRATED ONCE WITH A V-SHAPED TYPE OF WOUND EXTERNALLY.

HERE'S THE ONE THAT'S IN THE ARM WHICH IS GOING PRETTY MUCH STRAIGHT IN. THE ONES HERE ON THE BACK OF THE [1829] NECK ARE NEAR THE SKULL, BUT ARE IN THE SOFT TISSUE AND MUSCLE THAT'S JUST BELOW THE SKULL. AND YOU CAN SEE ONE HERE IN THE MIDLINE GOING TO THE LEFT. ANOTHER UP UNDER THE EAR. IN FACT, TWO

UNDER THE EAR THAT ARE GOING TO THE RIGHT SLIGHTLY DOWNWARD.

THE ONES THAT DO NOT HAVE THE GREEN ON IT ARE SUPERFICIAL, MEANING THAT THEY HAVE PENETRATED THE SKIN AND SOFT TISSUE, BUT HAVE NOT GONE INTERNALLY TO HIT ANY MAJOR VESSELS INTERNALLY, ALTHOUGH THEY COULD HIT SMALL ARTERIES AND VEINS IN THE SOFT TISSUE, BUT HAVE NOT PENETRATED INTO THE BODY CAVITY.

THERE'S ALSO HERE ON THE TOP OF THE HEAD AND MOSTLY ON THE BACK OF THE HEAD, BUT ON THE BACK TOP OF THE HEAD IS A LONG GASH THAT HAS SHARP CLEAN EDGES. WE DISTINGUISHED BETWEEN BLOWS THAT SPLIT THE SKIN AND KNIFE WOUNDS THAT SPLIT THE SKIN IN THAT BLOWS CAUSE DAMAGE TO THE EDGE OF THE WOUND. WE REFER TO THIS AS AN ABRASION ALONG THE EDGE SO THAT IT ACTUALLY PINCHES THE TISSUE BETWEEN THE HARD OBJECT AND THE BONE UNDERNEATH. THAT WAS NOT PRESENT HERE. THIS WAS A SHARP CUT. THERE ARE THREE WAYS IT COULD BE INFLICTED. AS I MENTION EARLIER IN TESTIMONY, THE FACT THAT IT MADE A CUT IN THE BONE THAT WAS IN THE MIDDLE OF THAT CHARACTERIZED BY THE BLACK LINE STRONGLY SUGGEST IT WAS A CHOP BECAUSE IT HAD ENOUGH FORCE TO THEN PENETRATE THE BONE FOR ABOUT AN EIGHTH OF AN INCH. [1830] THERE'S AT LEAST THE POSSIBILITY IT'S AN INCISED WOUND WHERE IT'S JUST CUT STRAIGHT DOWN WITH A LOT OF FORCE SO AS TO DO THE SAME.

AND LASTLY, IT COULD BE A STAB WHERE ONLY THE TIP OF THE BLADE WENT IN FROM ABOVE GOING DOWNWARD. I THINK THAT'S MUCH LESS LIKELY.

Q DOCTOR, STOP THERE IF YOU WOULD. SHOWING YOU STATE'S EXHIBIT NUMBER 113. WOULD YOU EXPLAIN TO THE JURY WHAT YOU'RE TALKING ABOUT, THE HEAD WOUNDS AND THE WOUNDS UP IN THE NECK AREA, ON UP.

A 113 SHOWS THE BACK OF THE NECK AND THE BACK OF THE HEAD. THE WOUND I JUST DISCUSSED WITH YOU ON THE UPPER BACK OF THE HEAD IS THIS ELONGATED INCISED WOUND, MEANING IT'S MOST LIKELY A CUT WITH A SHARP EDGE MOVING FROM ONE END TO THE OTHER OR A CHOP.

HERE ARE THE THREE STAB HOLES THAT I CHARACTERIZED HERE, HERE AND HERE WITH THE PROBE (INDICATES). ONE IN THE MIDDLE OF THE NECK AND TWO ON THE LEFT SIDE. ONE RIGHT AT THE HAIRLINE AND THIS ONE IN THE TOP OF THE LEFT SHOULDER NEAR THE EDGE OF THE NECK IS THIS WOUND THAT'S HERE JUST ABOVE THE LABEL.

AND I SHOULD MENTION THAT HERE ON THE RIGHT SIDE OF THE FACE IS A SPONGE THAT IS PUT UNDER THE FACE TO PREVENT DISFIGUREMENT OF THE INDIVIDUAL AT THE TIME WE'RE LAYING THEM FACE DOWN ON THE TABLE IN ORDER TO TAKE THE PHOTOGRAPHS. IT'S NOT PART OF THE BODY.

[1831] Q AND 112?

A 112 IS A CLOSE-UP OF THE WOUNDS UP ON THE BACK OF THE HEAD AND YOU CAN SEE THE SHARP EDGE ON THE – EDGE OF THIS WOUNDS INDICATING IT IS AN INCISED TYPE WOUND AS OPPOSED TO A BLOW OR SOME BLUNT OBJECT.

Q NOW, I WANT TO HAND YOU 111 AND 110, AND LET'S START WITH 111 FIRST. IF YOU WOULD COORDINATE THAT WITH THE EXHIBITS OF THE FIGURE WITH THE STICKS?

A 111 IS A PHOTOGRAPH OF THE DECEDENT LYING FACE DOWN SHOWING HER BACK AND IT SHOWS ALL OF THESE WOUNDS THAT ARE HERE CONCENTRATED PRIMARILY IN THE UPPER PART OF THE BACK, BUT, AS I MENTIONED, EVEN THOUGH THEY ARE –

THE COURT: EXCUSE ME, DOCTOR, THE JURORS DOWN HERE ARE HAVING A LITTLE TROUBLE SEEING, SIR.

THE WITNESS: I'M SORRY.

THIS – THIS IS A PHOTOGRAPH SHOWING THE INDIVIDUAL LYING FACE DOWN SO THAT YOU CAN SEE THE WOUNDS HERE PRIMARILY IN THE MIDDLE OF THE UPPER BACK. PLUS THERE'S A WOUND HERE IN THE LOWER BACK AND A WOUND ON THE BUTTOCKS. AND YOU CAN SEE SOME OF THE WOUNDS ON THE RIGHT SIDE AS WELL AS THE WOUNDS UP HERE ON THE BACK OF THE NECK. I WAS MENTIONING THAT EVEN THOUGH THERE'S A CONCENTRATION OF WOUNDS HERE IN THIS ONE AREA, AS YOU CAN SEE FROM THE MANNEQUIN,

THESE WOUNDS ARE GOING IN AT DIFFERENT ANGLES. SO THERE WAS MOST LIKELY MOVEMENT BY ONE OF THE PARTIES, [1832] EITHER THE PERSON DOING THE STABBING OR THE VICTIM OR BOTH.

Q AND THEN 110. DOES THAT MORE CLEARLY SHOW THIS WOUND WHERE YOU WERE TALKING ABOUT GOING IN THE SAME HOLE TWICE?

A 110 IS A PHOTOGRAPH THAT SHOWS A CLOSER VIEW OF THE UPPER PORTION OF THE BACK, AND AS POINTED OUT, THIS WOUND IN THE LOWER PORTION OF THAT IS A VERY DEEP WOUND WHERE IT HAS GONE IN, COME PARTIALLY OUT AND THEN GONE BACK IN AGAIN. AND YOU CAN SEE MORE CLEARLY ON THIS PHOTOGRAPH HOW DEEP THAT WOUND IS, AS WELL AS THE WOUND JUST TO THE RIGHT OF IT WHICH ALSO HAS GONE IN AT ONE ANGLE AND COME OUT AT A SLIGHTLY DIFFERENT ANGLE.

Q OKAY.

A I SHOULD MENTION THE FACT THAT THEY DO GO IN AT ONE ANGLE AND COME OUT AT A DIFFERENT ANGLE, AGAIN, INDICATES MOVEMENT ON THE PART OF ONE OR BOTH PARTIES.

Q SEE IF WE CAN TURN THIS AROUND.

NOW, LET ME SHOW YOU PHOTOGRAPH 115 AND IF YOU CAN COORDINATE THAT WITH 117?

A 115 IS A PHOTOGRAPH SHOWING PRIMARY THE RIGHT SIDE OF THE CHEST AND THE NECK. AS YOU CAN SEE HERE ON THE LOWER RIGHT CHEST, THERE'S A STAB WOUND AT THE EDGE OF THE

RIGHT BREAST. THERE ARE THREE STAB WOUNDS THAT ARE JUST BELOW THAT ON THE RIGHT CHEST AND NOTICE THEY ARE MUCH CLOSER TOGETHER HERE THAN THEY WERE ON THE BLOUSE WHEN WE LOOKED AT THE BLOUSE. THE BLOUSE SHOWED THE WOUNDS FURTHER DOWN [1833] INDICATING MOVEMENT BETWEEN THE SKIN AND – OR THE PERSON'S BODY AND THE CLOTHING BETWEEN THE STABS WOUND.

THERE'S ALSO THIS ONE THAT'S UP ON THE MID-CHEST THAT YOU CAN SEE HERE IN THIS PHOTOGRAPH AND THERE ARE CUTS ON THE NECK. HERE YOU CAN SEE THE SHALLOW CUT THAT'S ON THE RIGHT SIDE OF THE NECK THAT'S CHARACTERIZED HERE. THE DEEPER CUT IS CLOSED AT THIS POINT AND IT EXTENDS FROM THE RIGHT SIDE OF THE NECK ALL THE WAY ACROSS THE NECK IN THIS LOCATION IN THE FRONT OF THE NECK.

Q AND, DOCTOR, YOU SAID THAT ON THE BACK YOU HAD FIVE OF THESE STAKES WITH GREEN TIPS. YOU'VE GOT FIVE ON THE FRONT WITH GREEN TIPS. WHAT DOES THAT INDICATE?

A THAT'S CORRECT. THE GREEN TIPS THAT ARE PRESENT ON ALL FIVE OF THESE MEAN THAT THEY WENT INTO AN AREA OF THE BODY THAT WOULD BLEED SUFFICIENTLY TO BE ENOUGH TO CAUSE DEATH. ALL FIVE OF THESE PENETRATED THE CHEST CAVITY OR LIVER, WHICH IS IN THE UPPER ABDOMINAL CAVITY OR THE ABDOMINAL CAVITY AND STRUCK ORGANS THAT WOULD BLEED SUFFICIENTLY TO CAUSE DEATH. AND ALL OF

THESE CONTRIBUTED TO THE LOSS OF BLOOD INTO THE RIGHT CHEST AS WELL AS EXTERNALLY.

Q I WANT TO SHOW YOU 114 AND WHERE DOES THAT WOUND APPEAR ON OUR EXHIBIT HERE 117?

A 114 SHOWS THE RIGHT SIDE OF THE NECK AND IT SHOWS THE NATURE OF THIS VERY SUPERFICIAL WOUND ON THE RIGHT SIDE OF [1834] THE NECK THAT DOESN'T EVEN OR DOESN'T PASS THROUGH THE SKIN LAYER OVER HALF THE WOUND. THIS PORTION OF IT THAT I'M POINTING TO WHICH IS THE POSTERIOR OR HALF TOWARDS THE BACK OF THE NECK ONLY PASSES SHALLOW IN THE SKIN. THE OTHER PORTION ACTUALLY PENETRATES INTO SUBCUTANEOUS TISSUE. BUT THAT'S A FAIRLY SHALLOW WOUND ON THE SIDE OF THE NECK. IT WOULD NOT HAVE BEEN FATAL BUT WOULD HAVE BEEN PAINFUL.

Q AND THEN LASTLY, DOCTOR, REFERRING TO 116, IF YOU WOULD DESCRIBE TO THE JURY WHAT THAT IS RELATED TO THE EXHIBIT WE HAVE HERE.

A 116 IS AN ILLUSTRATION OF THE INCISED WOUND ACROSS THE NECK. THERE ARE ACTUALLY TWO WOUNDS. WE HAVE TILTED THE HEAD BACK A LITTLE WAYS SO THAT NOW YOU CAN SEE HOW DEEP THIS WOUNDS IS BECAUSE IT NOW GAPES. AND HERE YOU CAN SEE THAT THERE'S A SHARP EDGE THAT CONTINUES ALL THE WAY OVER HERE TO THE LEFT AND THEN THERE'S A V-SHAPED ISLAND OF TISSUE AND THEN ANOTHER INCISED WOUND THAT STARTS OVER HERE – OR I

SHOULDN'T SAY STARTS THERE BECAUSE IT DID NOT HAVE A CHARACTERISTIC TYPE OF LITTLE SCALLOPING TO SHOW IN WHICH DIRECTION THESE OCCURRED. THEY COULD HAVE OCCURRED IN EITHER DIRECTION. BUT HERE WERE AT LEAST TWO CUTS IN THE NECK. ONE SEVERED THE TRACHEA, WHICH YOU CAN SEE IS THIS ROUND STRUCTURE IN THE UPPER PART OF THE NECK. YOU CAN ALSO SEE SOME VOMITUS INSIDE THE TRACHEA IN THE UPPER PORTION. YOU CAN'T SEE THE LOWER PORTION BECAUSE IT'S [1835] SEPARATED, BUT THERE'S NO VOMITUS IN THE LOWER PORTION OF THE AIRWAY, ONLY IN THE UPPER PORTION.

Q WHAT DOES THAT MEAN, DOCTOR? YOU HAD VOMIT IN THE UPPER PART, BUT NOT IN THE LOWER PART? WHAT DOES THAT MEAN?

A WHEN A PERSON VOMITS AND THEN ASPIRATES, IT MEANS THAT THEY ALLOW BLOOD OR GASTRIC CONTENT, WHICH WE ARE ALL FAMILIAR WITH, VOMITUS COME UP OUT OF THEIR STOMACH.

IF THEY THEN ASPIRATED INTO THEIR AIRWAY, IT GENERALLY GOES ALL THE WAY DOWN INTO THEIR LUNGS AND CAN ACTUALLY CAUSE PNEUMONIA AND DEATH; OR CAN CAUSE ACUTE DEATH FROM OCCLUDING THE AIRWAY ITSELF FROM THE EFFECTS OF THE ACID. THE FACT THAT THE VOMITUS DID NOT GET INTO THE LOWER AIRWAY INDICATES TO ME THAT THE VOMITING OCCURRED AFTER THE CUT THROUGH THE TRACHEA SO THAT IT WAS ABLE TO COME DOWN TO THIS POINT AND

SPILL OUT, BUT COULD NOT COMMUNICATE WITH THE LOWER AIRWAY WHICH WAS CLEAN.

AS I MENTIONED, THERE ARE TWO CUTS ACROSS THE FRONT OF THE NECK. ONE THROUGH THE TRACHEA. THE ESOPHAGUS IS INTACT WHICH IS BEHIND THE TRACHEA. THERE WAS A CUT THROUGH THE LEFT JUGULAR VEIN HERE ON THE – ON THIS SIDE. THERE WAS NO CUT THROUGH EITHER OF THE MAJOR VESSELS IN THE BACK OF THE NECK, THE ARTERIES, ONLY THE LEFT JUGULAR VEIN.

Q WOULD YOU SHOW THAT VOMITUS STUFF STARTING DOWN THERE AND COMING DOWN THIS WAY? IT'S KIND OF HARD TO SEE.

[1836] A. THE TRACHEA IS THIS ROUND STRUCTURE THAT YOU CAN SEE PART OF HERE AND THE BLACK MATERIAL INSIDE IS THE VOMITUS.

THE TRACHEA BEING THIS SORT OF SEMI-CIRCULAR AREA. IT'S A CARTILAGINOUS RING THAT HOLDS THE AIRWAY OPEN. AND THAT'S THE TRACHEA. THE BLACK MATERIAL BEING THE VOMITUS IN THE TRACHEA.

Q NOW, DOCTOR, LET ME ASK YOU A QUESTION AND I'M GOING TO TURN THIS SIDEWAYS. THESE STAB WOUNDS AND I THINK YOU SAID IT WAS THIRTY-ONE, NOT INCLUDING THE NECK AND THE THROAT?

A THAT'S CORRECT.

Q SO THAT WOULD BE THIRTY-TWO, THIRTY-THREE – THIRTY-FOUR BECAUSE THERE ARE TWO UP THERE. WOULD THESE HAVE BEEN PAINFUL?

A WE HAVE ALL BEEN CUT BY SOME OBJECT, GLASS OR A KNIFE OR PAPER AND WE ALL REALIZE IT IS PAINFUL. NOW, THERE ARE CERTAIN PARTS OF THE BODY WHERE IT'S MORE PAINFUL. HANDS HAVE MORE SENSORY RECEPTORS THAN OTHER PARTS OF THE BODY, BUT ANY TIME YOU CUT YOURSELF, IT'S PAINFUL. SO IN MY OPINION, ALL OF THESE WOULD HAVE BEEN PAINFUL. SOME WOULD HAVE BEEN MORE PAINFUL THAN OTHERS.

Q WOULD DEATH HAVE BEEN INSTANTANEOUS IN THIS SITUATION, DOCTOR?

A NO, IT WOULD NOT IN MY OPINION WITHIN REASONABLE MEDICAL CERTAINTY BECAUSE FOR ONE THING, IN ORDER FOR THERE [1837] TO BE A RED COLOR TO THE FAT – WE ALL HAVE A THIN AREA OF FAT CALLED THE PANNICULUS UNDER OUR SKIN. WHEN WE MAKE A DISSECTION AT THE TIME OF AUTOPSY, AT DEATH, WE SEE A YELLOW PANNICULUS. THE SKIN IS NORMAL AND THE FAT UNDERNEATH IT IS YELLOW. WHEN WE SEE A PERSON WHO HAS BEEN STABBED OR CUT DURING LIFE BECAUSE THE HEART IS STILL PUMPING BLOOD UNDER PRESSURE AND THAT BLOOD LEAKS OUT OF THE SMALL CAPILLARIES THAT ARE DISRUPTED BY THE CUT OR STAB INTO THE SURROUNDING TISSUE SO WE CANNOT WASH IT OFF, SUCH – THIS TYPE OF INJURY WE CALL A CONTUSION OR A BRUISE JUST AS THE SAME TYPE OF BRUISE YOU WOULD GET IF

YOU INJURED YOURSELF AND HAD TURNED PURPLE.

ALL OF THESE WOUNDS HAD THIS TYPE OF HEMORRHAGE IN THE TISSUE THAT WOULD NOT WASH OFF. SO ALL OF THESE STAB WOUNDS AND INCISE WOUNDS OCCURRED WHILE THE HEART WAS STILL BEATING. NONE OF THESE WERE RAPIDLY FATAL. HAD IT GONE THROUGH THE CAROTID ARTERIES, IT COULD HAVE BEEN RAPIDLY FATAL, BUT EVEN THEN, IF A PERSON HAS THEIR NECK CUT COMPLETELY SO IT GOES DOWN TO THE ARTERIES, IT TAKES A MATTER OF SECONDS FOR YOU TO BLEED ENOUGH TO NOT HAVE ENOUGH BLOOD IN YOUR HEART TO GET TO YOUR BRAIN AND AT THE POINT WHERE YOU HAVE NO BLOOD GOING TO YOUR BRAIN, YOU HAVE TEN TO FIFTEEN SECONDS OF CONSCIOUSNESS BEFORE YOU PASS OUT.

A PERSON IN AN I.C.U. UNIT WHO IS BEING MONITORED [1838] WHOSE HEART STOPS ON THE MONITOR, WHEN THE NURSE WALKS IN, THEY – THE PATIENT DOESN'T REALIZE THAT, BUT THEN A FEW SECONDS LATER, TEN OR 15 SECONDS AFTER THE EVENT, THEY DO PASS OUT.

SO ALL OF THESE OCCURRED DURING THE TIME THE HEART WAS BEATING. THERE'S NOTHING THAT WOULD BE INSTANTANEOUSLY FATAL AND NOTHING THAT WOULD EVEN BE RAPIDLY FATAL. ALL OF THEM WERE INFLICTING WOUNDS THAT WOULD CAUSE BLEEDING, BUT ONLY TEN THAT WENT IN HIT THE LUNG WHICH IS A LOW PRESSURE SYSTEM IN THE BODY. IT'S NOT WHERE WE HAVE A LOT OF

BLOOD COURSING THROUGH THERE UNDER PRESSURE. SO THE BLOOD WOULD HAVE BEEN COMING OUT SLOWLY. SOME OF THE SUPERFICIAL STAB WOUNDS MAY HAVE HIT SMALL ARTERIES THAT MAY SPURT, BUT NOT ENOUGH TO CAUSE RAPID DEATH.

Q WHAT ABOUT THE ONES ON THE THROAT? WOULD THAT –

A AS I MENTIONED, THE ONE TO THE THROAT WOULD NOT HAVE – DID NOT PENETRATE ANY ARTERIES OF MAJOR SIZE, ONLY SUPERFICIAL AND IT'S NEAR THE SURFACE. IT DID CUT THROUGH THE AIRWAY, BUT THE PERSON COULD STILL BREATH THROUGH THAT AIRWAY.

Q THEY WOULD HAVE BEEN BREATHING THROUGH THE CUT?

A THAT'S CORRECT.

Q NOW, THE WAY THESE DIRECTIONS ARE – THIS IS NOT JUST A RAPID ONE MOVEMENT THING. THESE CAME FROM ALL KIND OF [1839] DIFFERENT DIRECTIONS, IS THAT CORRECT?

A I CAN'T SPEAK TO THE SPEED, BUT, YES, THEY CAME FROM ALL DIFFERENT DIRECTIONS. OBVIOUSLY, A PERSON CAN BE STABBED MULTIPLE TIMES VERY QUICKLY.

IN OTHER WORDS, YOU COULD INFLICT SIXTY STAB WOUNDS ON A PERSON IN A MINUTE'S TIME. BECAUSE YOU CAN CERTAINLY STAB SOMEBODY IN LESS THAN A SECOND OR WITHIN A SECOND. SO I DON'T HAVE ANY WAY OF KNOWING HOW

QUICKLY OR HOW SLOWLY THESE OCCURRED. ALL I CAN SAY IS THAT THEY COULD HAVE OCCURRED RAPIDLY, BUT THERE HAD TO BE MOVEMENT BETWEEN THE TWO PARTIES, EITHER ON THE PART OF ONE OR BOTH BETWEEN MOST OF THE STAB WOUNDS BECAUSE THERE ARE HARDLY ANY THAT FOLLOW THE SAME PATH IN THE BODY. AND SO IT HAS TO TAKE SOME PERIOD OF TIME, BUT I CANNOT GIVE YOU A SPECIFIC PERIOD OF TIME.

Q YOU TESTIFIED THE OTHER DAY THERE WERE NO DEFENSIVE WOUNDS?

A THAT'S CORRECT.

Q AND WHAT DID YOU MEAN BY THAT?

A THE FACT THERE WERE NO WOUNDS ON THE HANDS, ARMS OR LEGS WHICH OCCUR WHEN A PERSON IS TRYING TO PREVENT AN INDIVIDUAL FROM CUTTING THEM WITH SOME SHARP OBJECT, THEY HAVE NOTHING TO DEFEND THEMSELVES WITH BUT THEIR EXTREMITIES, SO THOSE AREAS OF THE BODY GET CUT. OFTENTIMES THE HAND WILL GRAB THE KNIFE AND THERE WILL BE A [1840] CUT IN THE HAND AND THERE WERE NONE OF THOSE PRESENT.

Q NOT HAVING ANY DEFENSIVE WOUNDS, I'M SHOWING YOU 108, THE HANDS AND THE BACK BOUND WITH TAPE AND APPARENTLY NO BLOOD ON THEM.

DO YOU HAVE AN OPINION AS TO WHETHER HER HANDS WERE TIED OR WHETHER THEY WERE

FREE WHEN THESE STAB WOUNDS WERE INFLICTED?

A IN MY OPINION WITHIN REASONABLE MEDICAL CERTAINTY, HER HANDS WERE BOUND AT THE TIME SHE WAS STABBED BECAUSE THERE'S NO BLOOD ON THEM. GRANTED THE CLOTHING COULD HAVE PROTECTED THAT, BUT ONLY IF HER HANDS STAYED UNDER THAT CLOTHING. SO IN MY OPINION, SINCE THERE ARE NO DEFENSIVE WOUNDS, THERE IS NO BLOOD ON THE HANDS, HER HANDS, IN MY OPINION, WERE MOST PROBABLY BOUND AT THE TIME SHE WAS STABBED.

Q THANK YOU, DOCTOR. RETURN TO YOUR SEAT.

A (WITNESS COMPLIES.)

Q DOCTOR, I THINK YOU TESTIFIED THE OTHER DAY THOSE TEN WOUNDS WITH THE GREEN TIP BEING THE CAUSE OF DEATH AND HOW DID SHE DIE? WHAT WAS IT INSIDE?

A BY EXSANGUINATION OR SIMPLY BLEEDING TO DEATH, BY BLOOD BLEEDING OUT OF THOSE VESSELS INTO THE BODY CAVITY AS WELL AS OUTSIDE THE BODY.

Q SHE WAS PREGNANT?

A THAT'S CORRECT.

MS. FULLWOOD: YOUR HONOR, THE SAME OBJECTION AS [1841] WE MADE EARLIER.

THE COURT: OBJECTION IS OVERRULED. I NOTE YOUR OBJECTION.

THE SOLICITOR: TELL THE JURY ABOUT THE BABY, DR. SEXTON.

MS. FULLWOOD: WE MAKE THE SAME OBJECTION, YOUR HONOR.

THE COURT: NOTE YOUR OBJECTION. IT'S OVERRULED.

THE WITNESS: AT THE TIME OF AUTOPSY, WHEN WE EXAMINED THE INTERNAL ORGANS, WE FOUND THE DECEDENT WAS PREGNANT WITH A FETUS THAT WAS A WELL-DEVELOPED NORMAL APPEARING FETUS THAT WAS VERY PALE AND THE PLACENTA ATTACHED TO THE FETUS WAS ALSO PALE INDICATING THERE WAS NO BLOOD PRESENT IN EITHER TO THE NORMAL EXTENT THAT YOU EXPECTED. THERE WAS NO DISEASE OR ANY CONGENITAL DEFECT NOTED IN THE FETUS. THE FETUS WAS ESTIMATED TO BE ABOUT 23 WEEKS OF GESTATION, WHICH IS JUST SHORT OF SIX MONTHS, APPROXIMATELY SIX MONTHS. AND IN MY OPINION, BASED ON THE ABSENCE OF ANY CONGENITAL DEFECT, ANY DISEASE OR ILLNESS, AND THE LACK OF BLOOD BOTH IN THE BODY OF THE MOTHER AND THE BODY OF THE CHILD, THE CHILD DIED FROM LOSS OF BLOOD, LOSS OF NUTRIENTS BECAUSE OF THE MOTHER'S DEATH.

Q BOY OR GIRL?

A A LITTLE BOY.

Q AND WAS THERE ANYTHING ABOUT THAT LITTLE BOY THAT YOU [1842] COULD DETECT, WAS

ANYTHING ABNORMAL? ANY KIND OF DEFORMITY ANYTHING AT ALL?

A I SAW NOTHING ABNORMAL.

Q NOW, YOU SAID 23 WEEKS OF GESTATION. YOU DIDN'T TALK TO THE OB-GYN OR THE FAMILY MEMBERS OR ANYTHING ABOUT THAT?

A NO. THIS IS BASED ON – WE MEASURE THE LENGTH OF THE CHILD AND WEIGH THE CHILD AND DO OTHER DETERMINATIONS THAT GIVE US INDICATIONS FROM LOOKING AT TABLES AND THERE'S AN ESTIMATE OF THE AGE OF THE CHILD WHICH ARE EXTREMELY ACCURATE.

Q FROM YOUR EXAMINATION OF THE BABY, DO YOU HAVE AN OPINION AS TO IF THE MOTHER HAD LIVED A FULL TERM THAT BABY WOULD HAVE LIVED?

A IN MY OPINION, IT WOULD. IN FACT, AT THE TIME OF THE MOTHER'S DEATH, IF THE BABY IN SOME WAY COULD HAVE BEEN GOTTEN OUT OF THE UTERUS AT THAT TIME AND IMMEDIATELY CARED FOR, THERE ARE INFANTS THAT ARE SMALLER THAT ARE BORN IN HOSPITAL SETTINGS THAT SURVIVE. AS FAR AS WHETHER IT WOULD HAVE SURVIVED AT THIS TIME IF IT HAD BEEN BORN AT THE TIME OF THE INJURY TO THE MOTHER, I DOUBT IF THAT WOULD HAVE BEEN PROBABLE IN THAT SETTING. IT WOULD HAVE TO BE IN A HOSPITAL SETTING AND HAVE TO BE CARED FOR IMMEDIATELY.

Q SO BEING BORN, SAY AT HOME, THAT WOULD HAVE BEEN A LESSER CHANCE OF THE BABY SURVIVING?

A THAT'S CORRECT. AT THIS AGE AND SIZE.

[1843] Q IF MS. SHEALY HAD BEEN IN A HOSPITAL AT THE TIME THAT SHE WAS MURDERED –

MR. KIRKLAND: YOUR HONOR, I'M GOING TO OBJECT TO THAT. I THINK HE'S GOING A LITTLE OUTSIDE HIS AREA OF EXPERTISE.

THE SOLICITOR: HE'S AN EXPERT.

THE COURT: I SUSTAIN THE OBJECTION.

THE SOLICITOR: DOCTOR, LET ME ASK YOU THIS. THE AUTOPSY THAT YOU PERFORMED ON MS. SHEALY, TAKEN ALL OF THIS INTO ACCOUNT, IS IT YOUR OPINION THAT THAT BABY WAS A HEATHY BABY?

[1913] **DR. STEVEN SHEA – DIRECT BY MS. FULLWOOD**

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Q DR. SHEA, AS A RESULT OF YOUR REVIEW OF THE RECORDS AND THE TESTING YOU DID ON BILLY AND THE TIME YOU WENT – YOU DID SPEND WITH BILLY, DO YOU HAVE. AN OPINION AS TO WHETHER OR NOT BILLY IS MENTALLY ILL?

A YES, I DO. I DON'T BELIEVE THAT HE'S MENTALLY ILL.

Q WERE THERE ABNORMALITIES IN THE TESTING?

A HIS INTELLIGENCE WAS IN THE AVERAGE RANGE. HIS READING LEVEL WAS LOW FOR HIS AGE AND INTELLIGENCE, BUT IT PRETTY MUCH STAYED WHERE HE WAS WHEN HE GOT OUT OF SCHOOL. THE PERSONALITY TEST DID NOT INDICATE A MAJOR MENTAL ILLNESS, NOT A THOUGHT DISORDER, NOT PERSONALITY DISORDER. ESSENTIALLY, I – MY EVALUATION DID NOT SHOW THAT HE HAD A SIGNIFICANT MENTAL ILLNESS.

Q BASED UPON ALL OF THE INFORMATION THAT YOU HAVE CONCERNING BILLY, DO YOU HAVE ANY DIAGNOSIS THAT YOU CAN PIN ON HIM AT ALL?

A HE DIDN'T HAVE A PATTERN OF SEVERE ALCOHOL ABUSE, BUT HE WAS DRINKING AND – BEFORE HE GOT ARRESTED, HE WAS DRINKING AND HE WAS ALSO UNDERAGE. MY DIAGNOSIS WOULD BE ALCOHOL ABUSE IN REMISSION. HE'S LOCKED UP. SO HE'S IN A CONTROLLED ENVIRONMENT. HE'S NOT DRINKING NOW. HE MAY HAVE BEEN ON HIS WAY TO AN ALCOHOL PROBLEM. I WOULD GIVE [1914] HIM MOSTLY THAT DIAGNOSIS BECAUSE HE WAS DRINKING AT THAT AGE.

Q OKAY. WHEN YOU SAY, HE WAS DRINKING, DO YOU MEAN EVERYDAY, ALL THE TIME?

A NO, HE WAS DRINKING EPISODICALLY WITH HIS FRIENDS. WHEN HE DRANK, HE TENDED TO GET DRUNK. HE WAS – HE WAS EXPERIMENTING

WITH ALCOHOL THE WAY SOME TEENS DO, NOT IN A VERY HEALTHY WAY, BUT NOT NECESSARILY AN INDICATION THAT HE WAS AN ALCOHOLIC OR ANYTHING, BUT – AND IT'S A CONCERN WHEN SOMEBODY IS SIXTEEN, SEVENTEEN AND DRINKING.

Q I UNDERSTAND THAT'S OBVIOUSLY A MATTER TO BE CONCERNED ABOUT, BUT IN THAT AGE GROUP, IS IT ABNORMAL TO SEE?

A IT'S NOT – IT NOT TYPICAL, BUT IT'S NOT ABNORMAL EITHER.

IT'S SOMETHING THAT A LOT OF TEENS DO. HOPEFULLY THEY GROW OUT OF IT. EITHER, YOU KNOW, LEARN TO DRINK RESPONSIBLY OR NOT AT ALL.

Q OKAY. NOW, DR. SHEA, BASED UPON THE WORK THAT YOU HAVE DONE BOTH WITH BILLY IN PERSON AND ON YOUR REVIEW OF THE RECORDS, HAVE YOU BEEN ABLE TO FORM AN OPINION AS TO HOW BILLY WOULD ADJUST TO INCARCERATION?

A I DO HAVE AN OPINION ON THAT. YES.

Q OKAY. DR. SHEA, WHAT TYPES OF THINGS DO YOU HAVE TO LOOK AT WHEN YOU TRY TO ASSESS HOW A PERSON IS GOING TO ADAPT TO A PRISON ENVIRONMENT?

[1915] A I DID A FAIR AMOUNT OF THIS WHEN I WORKED FOR THE DEPARTMENT OF CORRECTIONS.

SOMETIMES THERE WERE QUESTIONS. IF SOMEBODY WOULD COME INTO A PRISON AND THEY'D

WANT TO KNOW IS THIS GUY OKAY TO GO INTO POPULATION, DO WE NEED TO LOCK HIM UP – EXCUSE ME, DO WE NEED TO LOCK HIM UP, WHAT DO WE NEED TO DO.

BASICALLY WHAT YOU DO IS YOU LOOK AT WHETHER OR NOT THERE'S ANY MENTAL ILLNESS OR ABNORMALITY GOING ON. ARE YOU GOING TO SEE, YOU KNOW, BIZARRE BEHAVIOR, THINGS THAT MOST PEOPLE CAN'T UNDERSTAND.

YOU ALSO LOOK AT WHAT – WHAT ARE THE CONDITIONS UNDER WHICH SOMEBODY IS VIOLENT. PEOPLE ARE RARELY VIOLENT ALL THE TIME. WHEN – WHEN DO THEY ACT UP? WHO DO THEY ACT UP AGAINST? WHAT KEEPS THEM FROM ACTING UP AND WHAT IS THE SITUATION THAT THEY ARE GOING INTO? SO YOU LOOK AT THE PATTERN OF WHAT THEY DO THAT'S A PROBLEM AND SEE WHETHER OR NOT IT FITS THE INSTITUTIONS,

Q OKAY. NOW – NOW, IN BILLY'S CASE, YOU'VE ALREADY TOLD THE JURY, HE DOES NOT HAVE ANY MAJOR MENTAL ILLNESS?

A NOT THAT I FOUND, NO.

Q WHAT ABOUT THE HISTORY OF VIOLENCE IN THIS CASE?

A THERE'S RELATIVELY NO HISTORY OF VIOLENCE. THERE WERE A COUPLE OF NORMAL SCHOOLBOY FIGHTS GROWING UP. THERE WAS A LARGER FIGHT THAT HE WAS PROVOKED INTO DEFENDING A [1916] FRIEND OF HIS THAT HE LOST. ESSENTIALLY THIS IS A SMALLER – A SMALL GUY

WHO WAS ALWAYS SMALL AND YOUNG LOOKING FOR HIS AGE WHO HAD A HISTORY OF TALKING HIS WAY OUT OF FIGHTS, RATHER THAN GETTING INTO THEM. THIS WAS A FAIRLY ISOLATED INSTANCE OF VIOLENCE ON HIS PART.

Q DID YOU SEE ANY INDICATION IN THE WORK THAT YOU DID, THAT BILLY HAD EVER BEEN INVOLVED GANG ACTIVITIES OR ANYTHING OF THAT NATURE.

A I DIDN'T SEE ANY GANG ACTIVITY. I DIDN'T SEE A HISTORY OF VIOLENCE AS A CHILD. I DIDN'T SEE AN INCREASE IN HISTORY OF VIOLENCE, WHICH IS WHAT YOU LOOK FOR IF SOMEBODY IS ON THE PROGRESSION OF GETTING MORE AND MORE VIOLENT ALL THE TIME. HE WOULD HAVE A BIG HISTORY OF FIGHTS. HE HAD NO PRIOR ARRESTS OR CONVICTIONS. I JUST DIDN'T SEE A SIGNIFICANT HISTORY OF VIOLENCE LEADING UP TO THIS.

Q OKAY. AND A PERSON'S HISTORY OF VIOLENCE, HOW DOES THAT HELP YOU PREDICT HOW THE PERSON WILL ADAPT TO INCARCERATION?

A WELL, YOU LOOK TO SEE HOW PEOPLE ARE VIOLENT OR WHEN THEY ARE VIOLENT.

IF SOMEBODY FIGHTS ALL THE TIME. IF SOMEBODY IS, YOU KNOW, LOOKING FOR TROUBLE. IF SOMEBODY HAS A HISTORY OF VIOLENCE WHERE THEY START OFF SMALL AND THEN IT GETS WORSE AND WORSE. YOU ARE GOING TO EXPECT IT TO CONTINUE TO GET WORSE AND THAT'S NOT THE

SORT OF THING I [1917] SAW IN THIS PARTICULAR CASE.

Q OKAY. IN MAKING THIS TYPE OF ASSESSMENT, DO YOU ALSO LOOK AT HOW AN INDIVIDUAL DEALS WITH DIFFICULTIES, WITH CONFRONTATIONS?

A YES, I DO. I LOOK AT HOW THEY'RE PROBLEM SOLVING AND HOW THEY'VE MANAGED TO AVOID VIOLENCE IN THE PAST. AND IN THIS CASE, I LOOKED AT HOW HE DID LEADING UP TO THIS AND ALSO IN THE JAIL. I DIDN'T SEE ANY FIGHTS IN THE JAIL. I – I HE DIDN'T HAVE ANY PRIOR EXPERIENCE OF BEING LOCKED UP, SO IT'S KIND OF SURPRISING THAT HE DIDN'T GET INTO AT LEAST ONE OR TWO FIGHTS. HE DIDN'T GET INVOLVED IN ORGANIZED GANGS IN THE JAIL. HE DIDN'T GET INVOLVED IN ANY – LIKE ORGANIZED REBELLING. THERE WAS NO GETTING INVOLVED IN UPRISING OR TRYING TO INCITE ANY UPRISINGS.

HE HAD BEEN APPROACHED BY SOME OF THE HOMOSEXUALS IN THE JAIL AND HE WAS ABLE TO TALK HIS WAY OUT OF THOSE SITUATIONS, RATHER THAN FIGHTING IS WAY OUT OF A SITUATION.

ALSO UNUSUAL WITH PEOPLE WHO DON'T HAVE A WHOLE LOT OF EXPERIENCE – ESSENTIALLY, HE IS A SMALL GUY WHO HIS ONE REAL FIGHT HE'S HAD IN HIS LIFE, HE LOST FAIRLY BADLY. AND HE HAS BEEN ABLE TO TALK HIS WAY OUT OF FIGHTS.

AGAIN, HE'S NOT MENTALLY ILL. THERE WAS NO BIZARRE BEHAVIOR THAT WOULD LEAD TO, YOU KNOW, ACTING OUT THAT NOBODY ELSE UNDERSTOOD. HE DID – WHEN HE WAS ANXIOUS AND STRESSED, HE DID TALK TO A COUNSELOR AT THE JAIL. THE [1918] ONE THING I DO WORRY ABOUT IS ALCOHOL OR DRUG ABUSE AND, YOU KNOW, ALCOHOL AND DRUGS JUST WERE NOT AVAILABLE IN LEXINGTON COUNTY JAIL AND THERE WAS NO LACK OF INHIBITION, YOU KNOW, IN THAT AREA. I JUST DIDN'T SEE ANY HISTORY OF VIOLENCE. ACTUALLY, I SAW HIM CREATIVELY FINDING WAYS TO AVOID VIOLENCE IN THE JAIL SETTING.

Q DID YOU TAKE INTO CONSIDERATION THE JAIL RECORDS THAT SAID THAT HE HAD SOME TYPE OF HOMEMADE WEAPON?

A IT'S THE BIGGEST CONCERN I HAD IN THIS WHOLE AREA WAS ABOUT THE HOMEMADE WEAPON. ONE OF THE THINGS YOU LOOK FOR WHEN YOU'RE ASSESSING FOR THE LIKELIHOOD OF VIOLENCE IS HOW – DO PEOPLE HAVE THE MEANS TO COMMIT BY THEM? DO THEY HAVE A WEAPON? DO THEY HAVE OPPORTUNITY?

AND THE FACT THAT HE MADE WEAPONS IS A HUGE CONCERN. I'VE WORKED IN PRISON AND JAILS AND IN LOCKED UNITS AND I'M THE FIRST ONE TO WORRY ABOUT WEAPONS BECAUSE IT PUTS ME AT RISK AS WELL AS EVERYBODY I WORK WITH. BUT THERE ARE DIFFERENT DEGREES OF WEAPONS

AND DIFFERENT WAYS AND MEANS AND MOTIVATIONS BEHIND THE WEAPONS.

ONE OF THF THINGS WE SEE WITH YOUNGER GUYS AND SMALLER GUYS HAVE A PATTERN OF TRYING TO ESTABLISH THEMSELVES AS BEING FAIRLY TOUGH OR NOT BEING POTENTIAL VICTIMS. AND THEY DO THINGS TO MAKE SURE THAT PEOPLE DON'T TRY TO ATTACK THEM OR DON'T THREATEN THEM.

AND ONE OF THE THINGS THEY DO IS THEY MAKE [1919] KNIVES, BUT THEY MAKE KNIVES IN A WAY THAT'S DIFFERENT FROM MOST OF THE INMATES WHO SCARE ME WORST IS THAT THEY MAKE THEM IN PUBLIC AND SHOW THEM AROUND. THE REASON THAT WE CATCH THEM ALL THE TIME IS BECAUSE THEY MAKE THE KNIVES IN FRONT OF OTHER PEOPLE. THEY SHOW THEM TO OTHER PEOPLE. THEY MAKE LOUD THREATS ABOUT I HAVE GOT A KNIFE AND I'M NOT AFRAID TO USE IT. AND IT'S MORE OF AN ATTEMPT TO PUFF THEMSELVES UP AND APPEAR TO BE NOT AFRAID AND ESSENTIALLY USE IT IN SELF-DEFENSE, NOT TO USE IT IN A FIGHT, BUT TO USE IT SO THAT EVERYBODY THINKS THAT THEY WILL LOOK SOMEWHERE ELSE FOR AN EASIER VICTIM.

THAT WASN'T MY BIGGEST CONCERN, BUT THE WAY HE MADE THEM, THE TYPES OF KNIVES HE HAD AND THE WAY HE SHOWED THEM AROUND WAS LESS OF A CONCERN TO ME THAN SOME OF THE OTHER WAYS THE KNIVES COULD BE USED.

Q HAVE YOU SEEN WORSE LOOKING KNIVES IN YOUR WORK OR WORSE LOOKING SHANKS, HOMEMADE WEAPONS IN PRISON?

A YES, MA'AM. I'VE SEEN A LOT – AND I DON'T WANT TO MINIMIZE THIS – YOU KNOW, ANY OF THE HOMEMADE KNIVES, BUT I'VE SEEN MANY WORSE LOOKING ONES.

ESSENTIALLY WHAT YOU SEE IS THIS IS THE SORT OF THING THAT LESS DANGEROUS GUYS AND LESS TOUGH GUYS RESORT TO TRY TO KEEP THE PREDATORS AT BAY. I MEAN, JAILS AND PRISONS ARE FILLED WITH PEOPLE WHO ARE FAR MORE MEAN AND FOR [sic] MORE DANGEROUS AND FAR MORE VIOLENT THAN MR. KELLY AND [1920] THE SORT OF THINGS YOU SEE WITH, YOU KNOW, FELLOWS LIKE HIM, IS THAT HE'S TRYING TO KEEP THOSE PEOPLE AWAY SO THEY WILL LOOK SOMEWHERE ELSE FOR AN EASIER TARGET.

Q AND THESE PEOPLE ARE PREDATORY IN WHAT WAY?

A PREDATORY IN A LOT OF WAYS. SOME ARE THIEVES. THEY'LL STEAL ANYTHING THAT THEY THINK THEY CAN GET AWAY WITH. STRONG ARMED ROBBERY SORTS OF THINGS. SOME ARE PREDATORY IN A VIOLENT WAY. THEY ARE BULLIES OR JUST ANGRY PEOPLE. OTHERS ARE SEXUAL PREDATORS. THAT THEY LOOK TO YOUNGER, SMALLER INMATES TO SEE IF THEY CAN HAVE SEX WITH THEM OR FORCE THEM INTO SEX. AND I WOULD EXPECT THOSE ALL TO BE PROBLEMS FOR ANY NEWCOMER

IN PRISON. ESPECIALLY SOMEBODY WHO LOOKS YOUNGER THAN 20-YEARS-OLD.

Q OKAY. BASED UPON YOUR REVIEW OF HIS RECORDS AND YOUR WORK WITH HIM, WHEN BILLY IS IN A STRESSFUL SITUATION IN A CORRECTIONAL SETTING, HOW DOES HE COPE? WHAT DOES HE DO?

A ACTUALLY, TO LOOK AT WHAT HE DID IN THE JAIL, HE COPED FAIRLY WELL. THE PROBLEMS I WOULD EXPECT FROM HIM IN THE DEPARTMENT OF CORRECTIONS WILL BE THINGS LIKE – WELL, THE SAME PATTERN OF TRYING TO PUFF HIMSELF UP TO MAKE HIMSELF SEEN [sic] TOUGHER. HE MAY GO THROUGH SOME MORE SHOWY SORTS OF BEHAVIORS. IN THE JAIL, HE HAD A FEW INCIDENTS WHERE HE REFUSED TO GO BACK TO HIS ROOM AND CALLED THE OFFICER'S NAME – CALLED THE OFFICERS' NAMES, CURSED AT [1921] THEM AND I'M NOT GOING BACK, I'M NOT GOING BACK AND THEN THEY ESCORT HIM BACK TO HIS ROOM. NOBODY EVER FOUGHT OVER THAT. IT WAS NO VIOLENCE AND HE PUT ON A BIG SHOW. AND HE NEVER PUT ON A SHOW WITH THE OTHER INMATES WHO MIGHT HIT HIM. HE PUT ON THE SHOW WITH THE OFFICERS WHO WOULD JUST PUT HIM BACK IN HIS ROOM. SO I EXPECT SOMETHING LIKE THAT.

Q FOR THE BENEFIT OF THE OTHER INMATES TO SEE IT?

A RIGHT.

IF HE WENT TO PRISON, WHEREVER HE GOES IN PRISON, HE WILL PROBABLY TRY TO MAKE ANOTHER HOMEMADE KNIFE IN A VERY SHOWY SORT OF WAY, SHOW IT AROUND TO SCARE PEOPLE.

Q DO YOU EXPECT HIM TO USE THE KNIFE IN ANY TYPE OF PREDATORY FASHION?

A WELL, THAT'S NOT BEEN – I'VE NEVER SEEN ANYTHING LIKE THAT IN THE JAIL NOW THAT – LIKE I SAID, THE ONE FIGHT HE HAD BEEN IN, HE LOST. THAT WAS BEFORE HE GOT LOCKED UP. SO I'D EXPECT THAT SORT OF – SOME SORT OF PROBLEMS. I EXPECT HIM TO HAVE PROBLEMS WITH SOME OF THE LARGER MORE PREDATORY INMATES JUST BECAUSE OF HIS SIZE AND HE WILL HAVE TO DO SOMETHING TO MARK UP HIS TERRITORY, TO TRY TO MAKE HIMSELF SEEM LIKE HE'S NOT AN EASY TARGET. WHEREVER HE ENDS UP IN PRISON, I EXPECT TO SEE HIM IN A FEW YEARS HAVE A BUNCH OF TATTOOS, TRY TO MARK HIMSELF UP SO THAT HE WILL LOOK OLDER, TOUGHER. IT'S SOMETHING YOU SEE ESPECIALLY WITH THE SMALLER GUYS. I EXPECT HIM TO BE A [1922] FAIRLY HEAVY USER OF MEDICAL SERVICES. HE'S –

Q WHY?

A HE'S NOT A VERY INSIGHTFUL GUY. WHEN HE FEELS DEPRESSED OR WHEN HE FEELS ANXIOUS, HE DOESN'T REALLY LABEL HIS EMOTIONS AS I'M SAD, I'M NERVOUS. HE TENDS TO LET IT GET TO HIM PHYSICALLY. AND SO HE COMPLAINS OF MY STOMACH HURTS, I'M FEELING QUEASY, THE FOOD

IS BOTHERING ME, I HAVE ACNE, I HAVE HEADACHES.

HE TENDS TO EXPRESS HIS EMOTIONS AS PHYSICAL COMPLAINTS SO HE – WHEN HE'S UNDER PRESSURE, THEY MAY SEE HIM GOING TO SICK HALL MORE THAN MOST INMATES ESPECIALLY AT THE START. THAT'S HOW HE DEALS WITH STRESS AND PRESSURE.

Q IN ARRIVING AT YOUR CONCLUSION, HAVE YOU TAKEN INTO CONSIDERATION THE FACT THAT SOMEONE CHIPPED MORTAR AWAY FROM A CINDER BLOCK IN THE CELL THAT HE WAS STAYING IN WITH TWO OTHER INMATES AND THE FACT THAT SOME INMATES CLAIM THAT – HE TALKED AT TIMES ABOUT ESCAPE?

A I'VE BEEN WORKING IN CORRECTIONAL PLACES FOR A LONG, LONG TIME AND MOST OF THE INMATES I HAVE DEALT WITH HAVE TALKED ABOUT ESCAPE AT ONE TIME OR ANOTHER. IT'S SOMETHING THAT INMATES TALK ABOUT AMONG THEMSELVES. IT'S SOMETHING THAT ESPECIALLY YOUNGER GUYS TALK ABOUT AND THEY TALK ABOUT IT WITH A LOT OF BRAVADO. THEY CAN'T KEEP ME IN HERE. I'M GOING TO GET OUT OF HERE. BUT I SEE VERY LITTLE ACTION ON IT. I READ INCIDENT REPORTS ABOUT HE'S THREATENING TO DO THIS [1923], HE'S THREATENING TO DO THAT, BUT HE NEVER FOLLOWS THROUGH. THERE'S A LOT OF BIG TALK AND SMALL SORTS OF ACTING UP TO MAKE THE OTHER INMATES THINK HE IS, YOU KNOW, AS BAD AS THEY ARE OR NOT AN EASY

TARGET. I'VE SEEN THESE SORTS OF THINGS HAPPEN ON UNITS THAT I'VE RUN AND THEY ARE CONCERNED WITH IT. THIS IS WHY WE HAVE CORRECTION SYSTEMS. THAT'S WHAT CORRECTIONS OFFICERS DO. THAT'S WHAT JAIL OFFICERS DO. THEY MAKE SURE THAT EVEN IF IT IS AN ATTEMPT, IT DOESN'T GET ANY FARTHER THAN THE TALKING OR THE INITIAL STAGES. THE DEPARTMENT OF CORRECTIONS AND THE LEXINGTON COUNTY DETENTION CENTER ARE PROFESSIONALS WHO MAKE SURE THAT FOLKS DON'T GET OUT OF THOSE PLACES ONCE THEY GET IN.

Q THEY ARE THERE TO KEEP PEOPLE IN?

A THAT'S WHY THEY ARE THERE. THEY DON'T CARE WHAT SOMEONE IS IN FOR. THEY ARE THERE TO MAKE SURE THAT EVERYBODY WHO HAS A PRISON SENTENCE SERVES IT BEHIND – BEHIND FENCES, BARBWIRE AND GUN TOWERS.

Q OKAY. NOW, IN ARRIVING AT YOUR CONCLUSIONS, DID YOU TAKE INTO CONSIDERATION THAT SOME INMATES CLAIM THAT HE TALKED ABOUT MAYBE TAKING A FEMALE GUARD HOSTAGE AND DOING THINGS OF THAT NATURE?

A YES, I DID. AGAIN, I HEARD A LOT OF – THERE WAS A LOT OF TALK AND NO BEHAVIOR. I SAW – YOU KNOW, I HEARD ABOUT A LOT OF PUFFING, OF DRAWING – DRAWING SCARY PICTURES –

[1924] Q WHAT KIND OF SCARY PICTURES?

A I HEARD ABOUT DRAWING PICTURES OF CHICKENS WITH THEIR HEADS CUT OFF AND TALKING ABOUT VIOLENT FANTASIES AND TALKING ABOUT TAKING HOSTAGES TO ESCAPE, BUT SOME OF THAT – IN TALKING TO HIM, SOME OF THAT WAS AS A RESULT OF OLDER INMATES TRYING TO SEE IF THEY COULD GET HIM STIRRED UP AND SOME OF IT WAS BIG TALK, JUST BIG TALK BY A GUY WHO WAS SMALLER THAN THE OTHER FELLOWS AND SCARED OF THE OTHER PEOPLE THAT HE WAS IN JAIL WITH. AND QUITE FRANKLY, VERY SCARED ABOUT GOING TO PRISON BECAUSE OF THE DANGERS THERE.

Q ARE PRISONS A VERY SAFE PLACE FOR A KID LIKE THIS?

A NO, THEY ARE NOT.

Q OKAY.

A BUT AGAIN, THAT'S WHAT CORRECTIONAL STAFF ARE THERE FOR. THEY ARE THERE TO MAKE SURE THAT PEOPLE ARE THERE, THAT THEY MINIMIZE ANY PROBLEMS AND THEY MAKE SURE PEOPLE STAY. THEY ARE QUITE GOOD AT THEIR JOBS. THEY REALLY ARE.

Q DR. SHEA, BASED UPON YOUR WORK IN THIS CASE AND YOUR PROFESSIONAL, EDUCATION AND EXPERIENCE, DO YOU HAVE AN OPINION ABOUT HOW BILLY WOULD MAKE AN OVERALL ADJUSTMENT TO PRISON?

A WELL, HE'S RELATIVELY INTELLIGENT. HE'S OF AVERAGE INTELLIGENCE. HE HAS GOOD FAMILY SUPPORT AND INMATES WHO HAVE GOOD FAMILY

SUPPORT TEND TO DO BETTER WHILE THEY ARE IN THERE. HE HAD A RELATIVELY GOOD ADJUSTMENT TO JAIL. [1925] THEY NEVER HAD TO LOCK HIM UP FOR ANY EXTENDED PERIODS OF TIME. THEY NEVER HAD TO REFER HIM FOR SAFEKEEPERS' STATUS. THERE WAS NO FIGHTING –

Q WHAT DO YOU MEAN BY SAFEKEEPERS' STATUS –

A WELL, THEY NEVER HAD – WHEN INMATES ARE PARTICULARLY DANGEROUS, THEY WILL SEND THEM OUT OF THE JAILS TO PRISON EVEN BEFORE THEIR TRIAL BECAUSE THEY ARE TOO DANGEROUS FOR JAIL. THAT WAS NEVER A QUESTION FOR SOMEBODY LIKE MR. KELLY.

HE TALKED TO COUNSELORS WHEN HE WAS UPSET OR DISTRESSED. WHAT I DIDN'T SEE IN THE RECORD WAS AS IMPORTANT AS WHAT I DID. YOU KNOW, THERE WAS AGAIN, NO SUICIDAL THREATS, NO MENTAL ILLNESS, NO VIOLENCE, NO GANG ACTIVITY, YOU KNOW.

I WAS ABLE TO WORK WITH HIM WITH HIS HANDS – HIS HANDS WERE NOT IN RESTRAINTS WHEN I WORKED WITH HIM AND HE DIDN'T POSE ANY THREATS TO ME. HE DIDN'T MAKE ME UNDULY NERVOUS. HE DIDN'T TRY TO – ONE OF THE THINGS I WATCH FOR IS WHEN I'M EVALUATING PEOPLE, SOMETIMES THEY WILL TRY TO STEAL MY EQUIPMENT. THEY WILL TRY TO STEAL PENCILS. THEY WILL TRY TO STEAL PENS. AND HE NEVER TRIED ANY – ANYTHING LIKE THAT.

I DON'T SEE ANYTHING THAT WOULD MAKE ME FEEL LIKE THE DEPARTMENT OF CORRECTIONS COULD NOT CONTAIN HIM. MY EXPERIENCE IS SUCH THAT THE DEPARTMENT OF CORRECTIONS [1926] HANDLES FAR, FAR WORSE THAN MR. KELLY EVERYDAY AND VERY WELL.

Q BASED UPON YOUR WORK IN THIS CASE AND YOUR PROFESSIONAL TRAINING AND EXPERIENCE, IS IT PROBABLE THAT BILLY WOULD BE A THREAT EITHER TO OTHER INMATES OR TO GUARDS IN A PRISON POPULATION?

A ANYTHING IS POSSIBLE, BUT WE HAVE NOTHING TO SUGGEST THAT. IF ANYTHING, I WOULD SAY THAT THE OTHER INMATES WOULD BE MORE OF A THREAT TO HIM.

Q THANK YOU, DR. SHEA.

PLEASE ANSWER ANY QUESTIONS THE PROSECUTION MAY HAVE.

MR. CHASE: MAY IT PLEASE COURT?

THE COURT: YES, SIR.

[1926] DR. STEVEN SHEA – CROSS BY MR CHASE

* * *

CROSS-EXAMINATION

BY MR. CHASE:

Q HI, MR. SHEA.

MY NAME IS TOM CHASE. JUST A FEW QUESTIONS. I JUST WANT TO COVER A COUPLE AREAS WITH YOU.

IN YOUR REPORT AND FROM YOUR TESTIMONY, I THINK IT'S PRETTY CLEAR THAT YOU ARE SAYING WILLIAM ARTHUR KELLY DOESN'T HAVE ANY SORT OF A MENTAL ILLNESS? I COULD NOT FIND THAT HE HAD ANY MENTAL ILLNESS. NO MENTAL ILLNESS THAT WOULD AFFECT HIS THINKING TO WHERE HE COULDN'T CONTROL WHAT HE WAS DOING?

[1927] A NO.

Q NO MENTAL ILLNESS THAT WOULD CAUSE HIS THINKING TO BE ABSTRACT OR DIFFERENT THAN A NORMAL PERSON'S?

A THERE'S NO INDICATION OF THAT.

Q IN OTHER WORDS, IF HE'S THINKING SOMETHING, IT'S THROUGH THE NORMAL PROCESS AND THERE'S NOTHING AFFECTING HIM?

A THAT'S –

Q – NOTHING THAT WOULD BE CONSIDERED A MENTAL ILLNESS?

A THAT'S CORRECT.

Q NOW, IN YOUR REVIEW OF THE RECORDS, YOU OBVIOUSLY LOOKED AT ALL OF THE MENTAL HEALTH RECORDS. THOSE WERE ALL PROVIDED TO YOU?

A YES.

Q SO THERE WOULDN'T HAVE BEEN ANY SORT OF MENTAL ILLNESS WHEN HE TOLD THE MENTAL HEALTH COUNSELOR THAT ANGER JUST HAPPENS TO HIM?

A THAT'S NOT AN INDICATION OF MENTAL ILLNESS, NO. NOT NECESSARILY.

Q AND IT CERTAINLY WASN'T A MENTAL ILLNESS THAT CAUSED HIM TO TELL THE MENTAL HEALTH COUNSELOR THAT HE OBSESSES AT TIMES ABOUT KILLING PEOPLE WHO PISSED HIM OFF AND THAT HE THINKS ABOUT HOW HE COULD DO IT AND NOT GET CAUGHT?

A THAT WOULD NOT BE AN INDICATION OF MENTAL ILLNESS, NO.

[1928] Q AND FROM THE RECORDS YOU REVIEWED, MR. KELLY DID TELL THAT TO MENTAL HEALTH COUNSELORS?

A I SAW THOSE RECORDS, YES, SIR.

Q AND THE FACT THAT MR. KELLY HAS VIOLENT FANTASIES, THAT'S NOT CAUSED BY MENTAL ILLNESS?

A NO, IT'S NOT.

Q THAT'S JUST WILLIAM ARTHUR KELLY?

A IT IS. THE – IT'S SOMETHING YOU SEE A LOT WITH PEOPLE WHO HAVE DONE SOMETHING VIOLENT. ESPECIALLY WHEN THEY DON'T HAVE A LONG HISTORY OF VIOLENCE. THEY ARE TRYING TO FIGURE OUT HOW COULD THEY HAVE DONE SUCH A THING, YOU KNOW, WHY – WHY DID I DO THIS. SOMETIMES WHAT THEY'VE DONE ACTUALLY SCARES THEM AND THEY FEEL THE NEED TO TALK ABOUT EVERY – EVERY IMPULSE, EVERY THOUGHT, EVERY SCARY THING TO MAKE SURE IT DOESN'T HAPPEN ANYMORE.

Q DR. SHEA, WHERE IN THE RECORDS THAT YOU REVIEWED DID YOU SEE EVIDENCE THAT WHAT HE HAD DONE TO SHIRLEY SHEALY HAD SCARED HIM?

A I GOT THAT FROM TALKING TO HIM.

Q FROM HIM?

A FROM HIM.

Q WHAT DID HE SAY ABOUT BEING SCARED ABOUT WHAT HE HAD DONE TO SHIRLEY SHEALY?

A HE GOT FAIRLY EMOTIONAL AND TALKED ABOUT HE COULDN'T BELIEVE HE COULD DO SUCH A THING.

[1929] Q COULDN'T BELIEVE THAT HE COULD DO THAT TO SHIRLEY SHEALY?

A RIGHT.

Q DID HE EXPRESS HOW HE FELT ABOUT WHAT HE HAD DONE?

A HE EXPRESSED THAT HE FELT SORRY FOR HAVING DONE IT. HE EXPRESSED FEELING SORRY FOR MS. SHEALY'S HUSBAND AND THE PAIN THAT HE WOULD HAVE CAUSED HER FAMILY AND THE MOST – THE MOST EMOTION I SAW IS HE – HE WAS VERY UPSET ABOUT HOW THIS HAD AFFECTED HIS MOTHER.

Q AND WHEN DID HE TELL YOU THAT?

A WHEN I SPOKE TO HIM AT THE JAIL.

Q AND WHEN WAS THAT?

A THAT WAS ON THE – SOMEWHERE BETWEEN THE 8TH AND 11TH OF AUGUST.

Q AND WHEN, ACCORDING TO YOUR SUBPOENA, OR IF YOU CAN SAY, DID THIS TRIAL BEGIN?

A MONDAY.

Q MONDAY OF THIS WEEK?

A THIS WEEK, CORRECT.

Q BEG THE COURT'S INDULGENCE JUST ONE SECOND, YOUR HONOR.

THE COURT: YES, SIR.

MR. CHASE: THANK YOU, YOUR HONOR.

NOW, YOU BASED ALL OF YOUR CONCLUSIONS ABOUT HIM BEING SCARED ON WHAT HE TOLD YOU AT THAT POINT?

[1930] THE WITNESS: SOME WAS ON WHAT HE TOLD ME. SOME WAS ON MY EXPERIENCE WITH YOUNGER, SMALLER INMATES. IN SOME WAYS, HE MINIMIZES HIS FEAR. HE DOESN'T LIKE TO TALK ABOUT IT, BUT MY OPINIONS ARE BASED, NOT JUST ON WHAT HE SAID, BUT ALSO ON WHAT HE DID AND WHAT I READ IN THE RECORDS.

Q DID YOU IGNORE THE FACT THAT THE MENTAL HEALTH COUNSELORS THAT HAD TALKED WITH HIM THROUGHOUT HIS STAY AT THE LEXINGTON COUNTY DETENTION CENTER DISCUSSED THINGS LIKE HE NEVER REALLY HAS ANY REMORSE FOR HIS CRIME –

* * *

[1940] THE COURT: ALL RIGHT. LET'S BRING THE JURY BACK.

(JURY IN.)

THE COURT: MR. FOREMAN, LADIES AND GENTLEMEN OF THE JURY, BEFORE YOU WENT TO THE JURY ROOM, THERE WAS A QUESTION POSED BY THE STATE AND I INSTRUCT YOU AT THIS TIME THAT YOU ARE TO DISREGARD THAT QUESTION AND YOU ARE NOT TO CONSIDER IT IN ANY FASHION WHATSOEVER IN YOUR DELIBERATIONS [1941] WHEN YOU DO BEGIN YOUR DELIBERATIONS AND THAT IT IS TO BE STRICKEN FROM THE RECORD.

ALL RIGHT, MR. CHASE.

MR. CHASE: THANK YOU, YOUR HONOR.

CONTINUED CROSS-EXAMINATION

BY MR. CHASE:

Q DR. SHEA, JUST ONE QUESTION. SOME OF THE QUESTIONS THAT I WAS ASKING YOU ABOUT, THE STATEMENTS THAT HE WAS MAKING WHILE HE WAS IN JAIL ABOUT THE VIOLENCE, ABOUT HIS VIOLENT FANTASIES, ABOUT THINKING OF WAYS TO KILL PEOPLE AND NOT GET CAUGHT, NONE OF THAT WAS DUE TO A MENTAL ILLNESS?

A THAT WAS NOT DUE TO A MENTAL ILLNESS, NO.

Q SO THAT'S JUST THE WAY WILLIAM KELLY IS?

A THERE ARE A LOT OF REASONS TO SAY THAT, BUT IT'S NOT DUE TO A MENTAL ILLNESS.

Q ONE OF THEM COULD BE THAT HE'S JUST MEAN?

A THAT COULD BE.

Q AND SINCE THERE'S NO MENTAL ILLNESS THAT WOULD HAVE CAUSED HIM TO DO WHAT HE DID TO SHIRLEY SHEALY ON JANUARY THE 5TH OF 1996, IT COULD HAVE BEEN BECAUSE HE'S JUST DOWN RIGHT MEAN?

A THAT COULD BE. BUT THERE ARE A LOT OF MEAN PEOPLE IN THE JAILS AND IN THE PRISONS IF THAT'S SO.

Q AND HE WOULD BE ONE OF THEM ONCE HE GOT THERE, RIGHT?

[1942] A HE WOULD BE THERE.

Q SO HE WOULD FIT RIGHT IN?

A I THINK THEY – I DON'T THINK THEY HAVE ANY TROUBLE CONTAINING HIM.

Q AND HE WOULDN'T HAVE ANY PROBLEM HANDLING HIMSELF?

A I'M NOT SURE HOW MUCH TROUBLE HE WOULD HAVE HANDLING HIMSELF.

Q WELL, LET'S GO INTO THAT. YOU DESCRIBED – YOU OBVIOUSLY HAVE EXTENSIVE EXPERIENCE IN THE OPERATIONS OF JAILS AND HOW INMATES HANDLE THEMSELVES IN JAILS AND HOW THEY CAN ADAPT TO IT. I BELIEVE THAT'S WHAT YOU WERE QUALIFIED TO GIVE AN OPINION IN?

A YES.

Q AND YOU'D HAVE TO AGREE WITH ME, WOULDN'T YOU, THAT A SHANK IS PROBABLY THE BEST WAY TO PROTECT YOURSELF IN A JAIL, ISN'T IT?

A ACTUALLY, QUICK WITS ARE BEST WAY TO PROTECT YOURSELF IN A JAIL.

Q SO YOU'RE DENYING THAT A SHANK WOULD BE A GOOD WAY TO PROTECT YOURSELF?

A IT DEPENDS ON HOW GOOD A SHANK, HOW GOOD YOU ARE AT USING IT, HOW GOOD YOU ARE AT FIGHTING. MY EXPERIENCE IS THAT BEING ABLE TO TALK YOURSELF OUT OF A SITUATION IS THE BEST WAY TO ADJUST AND GET ALONG IN JAIL. AND THE PEOPLE WHO DO BEST THERE ARE THE ONES WHO ARE ABLE TO DO THAT.

[1943] Q AND THE ONES WHO CAN PROTECT THEMSELVES ARE GOING TO DO THE BEST, RIGHT?

A IF NECESSARY.

Q AND THE ONES WHO CAN SHOW THAT THEY ARE TOUGH ARE THE ONES WHO ARE GOING TO DO WELL, RIGHT?

A OR AT LEAST SHOW THEMSELVES NOT TO BE EASY TARGETS.

Q AND THEY ARE THE ONES WHO ARE GOING TO RULE THE ROOST, RIGHT? THEY ARE GOING TO BE ROOSTERS?

A THE TOUGHER GUYS TEND TO RULE THE ROOST, BUT I DON'T SEE MR. KELLY AS RULING A WHOLE LOT. HE'S NOT THE SORT OF PERSON THAT WILL BE A LEADER IN A PRISON, ANYMORE THAN HE WAS A LEADER IN THE JAIL.

Q WELL, LET'S TALK ABOUT THE SHANK AND YOUR OPINION ON THE USE AND VERSUS SHOWING. YOU DESCRIBED TO THE JURY THAT WHEN YOU HAVE A SHANK, THAT THERE BASICALLY WOULD BE TWO WAYS THAT YOU COULD USE THAT, RIGHT? ONE WOULD BE TO ACTUALLY USE IT TO PROTECT YOURSELF OR ENFORCE?

A UH-HUH.

Q AND THE OTHER WOULD BE TO JUST KIND OF WAVE IT AROUND AND SHOW, LOOK HOW TOUGH I AM?

A THOSE ARE TWO WAYS, RIGHT.

Q OKAY. WHAT EVIDENCE DID YOU CONSIDER THAT SHOWED THAT THAT'S – THAT WILLIAM ARTHUR KELLY WALKED AROUND ON THE FLOORS AT THE DETENTION CENTER TO EACH ONE OF THOSE INMATES GOING, LOOK HERE, I'VE GOT THIS; I'VE GOT THIS? [1944] WHAT EVIDENCE DID YOU CONSIDER?

A THE EVIDENCE I CONSIDERED WERE THE INCIDENT REPORTS AND MY CONVERSATION WITH MR. KELLY –

Q MR. KELLY –

A – AND MY UNDERSTANDING THAT HE MADE THE KNIFE IN FRONT OF OTHER PEOPLE.

Q WHO DID HE MAKE IT IN FRONT OF?

A MY UNDERSTANDING WAS HE MADE IT IN FRONT OF THE OTHER PEOPLE WHO WERE IN THE CELL WITH HIM.

Q WHO DID HE SAY HE SHOWED IT TO?

A HE SAID HE MADE IT IN FRONT OF EVERYBODY AND JUST HAD IT OUT.

Q IN FRONT – AND THAT'S ALL I'M ASKING IS WHO WOULD IT HAVE BEEN?

A HE DIDN'T GIVE ME ANY INDIVIDUAL NAMES.

Q SO YOU DIDN'T TALK TO ANYBODY WHO HE SAID HE SHOWED THIS TO?

A NO. I LOOKED AT THE INCIDENT REPORT THAT INDICATED THAT ANOTHER INMATE

REPORTED TO AN OFFICER THAT HE HAD A HOME-MADE KNIFE.

Q IN FACT, THE INCIDENT REPORT THAT YOU ARE REFERRING TO, ALL THAT SHOWED WAS THAT HE HAD IT ON HIS PERSON ACTUALLY CONCEALED, RIGHT?

A CORRECT.

Q SO WHAT ARE YOU CONSIDERING THAT SHOWS HE'S BEEN [1945] SHOWING IT TO PEOPLE? HOW DOES THAT PROVE TO YOU, AS AN EXPERT, THAT HE'S GOING AROUND USING THAT JUST TO SHOW HE'S TOUGH?

A I NEVER MEANT TO IMPLY THAT HE WAS WALKING AROUND FROM PERSON TO PERSON SAYING I'VE GOT A KNIFE. HE MADE IT IN FRONT OF, AT LEAST, ONE OTHER PERSON SO THAT PEOPLE WOULD SEE THAT HE WAS MAKING IT.

Q OKAY. DID YOU CONSIDER THE EVIDENCE THAT HE HAD ACTUALLY USED THAT AND HAD IT HIDDEN WHEN MS. PRICE CAME INTO THE ROOM – INTO HIS CELL THAT ONE AFTERNOON – THAT ONE EVENING? DID YOU CONSIDER THAT EVIDENCE?

A I DON'T RECALL THAT PARTICULAR EVENT, NO.

Q OKAY. SO YOU NEVER GOT THE INFORMATION FROM MR. KELLY ABOUT WHEN HE STOOD BEHIND THE DOOR OF HIS CELL AND TRIED TO LURE HER IN THERE AND HAD A SHANK RIGHT BACK BY HIS SIDE WHICH HE WAS GOING TO USE

TO TAKE HER HOSTAGE? YOU DIDN'T HAVE THAT INFORMATION AVAILABLE TO YOU?

A I NEVER GOT ANY INFORMATION ABOUT THAT, NO.

Q DR. SHEA, WOULD YOU AGREE WITH ME THAT THAT'S NOT JUST SHOWING TO OTHER INMATES TO SHOW YOU ARE TOUGH?

A I DON'T – I DON'T KNOW THE SITUATION. IF HE WAS STANDING THERE WITH A KNIFE BEHIND SOMEBODY, THAT'S – THAT'S SERIOUS, BUT I JUST DON'T HAVE ANY INFORMATION ABOUT THAT.

Q AND I'M – I'M NOT ASKING YOU WHETHER IT HAPPENED. [1946] I'M ASKING YOU IF YOU WERE PRESENTED WITH THOSE FACTS, WOULD YOU CONSIDER THAT TO BE THE OPPOSITE OF SHOWING? THAT'S ACTUALLY THREATENING TO USED AND ACTUALLY ACTIVELY BEING INVOLVED IN USING IT?

A AGAIN, I DON'T KNOW WHAT THE SITUATION WAS. IF IT WAS A SITUATION WHERE THERE WERE A LOT OF BIG THREATS AND NO ACTION, THAT'S – THAT FITS IN WITH THE PATTERN I WAS TALKING ABOUT. I –

Q NOW –

A – I SAID BEFORE, THE SHANK IS PROBABLY THE THING THAT GIVES ME THE MOST CONCERN AND THESE ARE, YOU KNOW, RELATIVELY COMMON. YOU HEAR ABOUT THEM, YOU SEE THEM, YOU TAKE THEM AWAY. THE OFFICERS DO A PRETTY GOOD JOB OF FINDING THEM. AND IT'S PRETTY

CONSTANT, A PRETTY CONSTANT OPERATION FOR THE JAILS AND THE PRISONS TO MAKE SURE THAT INMATES DON'T HARM THEMSELVES –

Q DOCTOR –

A – THEY ARE PRETTY GOOD AT IT.

Q – I APOLOGIZE. I DIDN'T MEAN TO TALK WHEN YOU WERE FINISHING YOUR ANSWER.

WHO DO YOU THINK WOULD BE A BETTER SOURCE TO FIND OUT ABOUT THE NUMBER OF SHANKS IN A PRISON, THE GUARDS OR THE INMATES?

A I THINK THEY BOTH HAVE A PRETTY GOOD IDEA HOW MANY SHANKS ARE IN THE PRISON.

[1947] Q DR. SHEA, ARE YOU TELLING ME THAT AS TO THE ACTUAL NUMBER OF SHANKS THAT ARE BEING CARRIED AROUND IN A JAIL, THE PEOPLE WHO THEY ARE BEING HIDDEN FROM ARE A BETTER SOURCE OF KNOWING HOW MANY ARE IN THERE AND HOW MANY ARE AVAILABLE AND WHO IS CARRYING THEM THAN THE INMATES WHO ARE SUPPOSEDLY BEING INTIMIDATED BY THEM OR PLANNING TO USE THEM OR MAKING THEM OR CARRYING THEM? WHO WOULD BE A BETTER SOURCE?

A IF THOSE KNIVES WERE BEING HIDDEN, THEN THE OTHER INMATES WOULDN'T KNOW ABOUT THEM ANYMORE THAN THE OFFICERS WOULD. I THINK THAT THE OFFICERS ARE REALISTIC ABOUT THE NUMBER OF SHANKS IN THE JAILS. THEY KNOW THAT THEY ARE THERE. THEY KNOW

TO LOOK FOR THEM. THEY KNOW TO BE CAREFUL OF THEM.

I THINK THE OTHER INMATES MAY HAVE MORE INFORMATION ABOUT WHERE INDIVIDUAL SHANKS ARE BECAUSE IF THE OFFICERS KNEW, THEY WOULD GO IN AND TAKE THEM, BUT I THINK THAT THE OFFICERS ARE NOT NAIVE ABOUT THE PRESENCE OR ABSENCE OF KNIVES IN JAILS OR IN PRISONS.

Q WE BOTH CAN AGREE THAT THERE ARE A LOT OF SHANKS IN JAIL?

A YES.

Q AND YOU WOULD AGREE WITH ME THAT IF SOMEONE IS CONTINUING TO MAKE THEM, JUST THE FACT THAT THERE IS ONLY EVIDENCE OF ONE GUARD REPORT OF HAVING FOUND THEM CERTAINLY [1948] DOESN'T SHOW THAT THEY HAVEN'T HAD THEM ON OTHER OCCASIONS?

A THAT'S CORRECT.

Q AND, IN FACT, IF THERE WAS EVIDENCE FROM AN INMATE WHO WAS IN A CELL WITH A PERSON WHO WAS MAKING SHANKS ON A REGULAR BASIS, WOULDN'T THAT BE GOOD EVIDENCE THAT THERE WERE ADDITIONAL SHANKS?

A YES.

Q NOW, YOU ALSO TALKED ABOUT BEING INVOLVED IN GANGS. WHAT DO YOU USE AS EVIDENCE THAT A PERSON MAY BE IN A GANG? WHAT

DO YOU USE AS AN EXPERT IN PRISON LIFE, WHAT DO YOU USE?

A I USE REPORTS FROM CORRECTIONAL STAFF. I USE WHETHER OR NOT SOMEONE IS WEARING SOMETHING THAT IDENTIFIES HIM ASS [sic] A MEMBER OF A GANG OR A CLUB. I –

Q AND WHAT –

A – I RELY ON PEOPLE'S DESCRIPTION OF THEIR AFFILIATIONS.

Q WHAT WOULD IDENTIFY A PERSON WITH A GANG?

A WHETHER OR NOT THEY WERE WEARING SOMETHING THAT HAD THEM AS PART OF A GANG.

Q WHICH WOULD BE?

A A – IN JAILS AND PRISONS, IT'S USUALLY WRITING THE GANG'S NAME OR AFFILIATION ON THE T-SHIRT OR JUMPSUIT USUALLY WITH A PEN.

Q THEY JUST PUT IT ON THEIR CLOTHING –

A [1949] ACTUALLY THEY DO. SOMETIMES THEY TATTOO IT ON, BUT TYPICALLY, IN JAILS, THEY USUALLY WRITE IT ON THEIR CLOTHES.

Q SO YOU WOULD AGREE WITH ME THAT THEY WILL FREQUENTLY MAKE MARKS EITHER ON THEIR CLOTHING OR PERMANENTLY IN THEIR SKIN TO SHOW THEIR AFFILIATIONS WITH GANGS?

A VERY OFTEN, YES, SIR.

Q AND A LOT OF TIMES, THAT'S JUST SYMBOLS, ISN'T IT? TATTOOS OR MARKINGS ON THE UNIFORMS?

A THEY COULD BE, YES.

Q DID YOU ASK WILLIAM ARTHUR KELLY WHETHER HE HAS ANY TATTOOS?

A I TYPICALLY DO. I DON'T REMEMBER WHETHER I DID OR NOT. I'M NOT AWARE THAT HE HAD ANY.

Q YOU DIDN'T CHECK TO WHETHER HE HAD ANY?

A NO, I DIDN'T.

Q DID YOU SEE THESE ON WILLIAM ARTHUR KELLY?

A NO, I DID NOT.

Q IS THAT WILLIAM ARTHUR KELLY?

A YES, IT IS.

Q YOUR HONOR, AT THIS TIME, WE WOULD MOVE THESE TWO PHOTOGRAPHS INTO EVIDENCE.

THE COURT: ANY OBJECTION?

MS. FULLWOOD: SIDE BAR.

(WHEREUPON, A BENCH CONFERENCE WAS [1950] HELD AT THIS TIME OFF THE RECORD.)

MR. CHASE: YOUR HONOR, AT THIS TIME, WE WOULD MOVE THESE PHOTOGRAPHS INTO EVIDENCE.

MS. FULLWOOD: NO OBJECTION.

THE COURT: WITHOUT OBJECTION, THEY WILL BE ADMITTED AS STATE'S NUMBER 124 AND 125.

(WHEREUPON, STATE'S EXHIBIT NUMBERS 124 AND 125, PHOTOGRAPHS, ENTERED INTO EVIDENCE AT THIS TIME WITHOUT OBJECTION.)

MR. CHASE: DR. SHEA, YOU ALSO DISCUSSED THE PROBLEMS THAT YOU WOULD EXPECT FROM WILLIAM ARTHUR KELLY WOULD HE BE PLACED INTO THE PENAL SYSTEM IN SOUTH CAROLINA –

THE WITNESS: YES.

Q – CORRECT? AND YOU DISCUSSED THE FACT THAT THERE'S KIND OF TWO DIFFERENT WAYS THAT INMATES WILL APPROACH ESCAPES. ONE WOULD BE THEY WILL TALK ABOUT IT, IS THAT RIGHT?

A THAT'S RIGHT.

Q AND THEY ALL TALK ABOUT IT. I THINK WE CAN AGREE ON THAT POINT?

A MOST OF THE INMATES I HAVE EVER MET EITHER TALK ABOUT IT OR ADMITTED HAVING TALKED ABOUT IT.

Q FROM YOUR EXPERIENCE?

A YES.

[1951] Q AND THEN THERE'S THE SECOND SIDE OF ACTUALLY TAKING ACTION TO ESCAPE?

A CORRECT.

Q YOU WOULD AGREE THAT THERE IS BIG DIFFERENCE BETWEEN THE TWO?

A THERE IS, YES.

Q IN FACT, IF THEY ARE JUST TALKING ABOUT IT, THAT'S NORMAL. THAT'S PRETTY NORMAL. I MEAN, YOU'RE AN INMATE THAT YOU ARE NOT GOING TO WORRY ABOUT TOO MUCH. IF THEY DID THAT, YOU ARE NOT GOING TO HAVE A WHOLE LOT OF CONCERN?

A WELL, I – DEPENDED ON WHAT THEY WERE TALKING ABOUT. I MIGHT HAVE A CONCERN.

Q WHEN IT'S JUST TALK, YOU ARE NOT THAT CONCERNED ABOUT IT, RIGHT?

A WELL –

Q LET ME ASK YOU THIS AND THIS – WELL, YOU CAN ANSWER THE QUESTION. I'M SORRY, I DIDN'T MEAN TO INTERRUPT YOU.

A HAVING – HAVING WORKED IN PLACES WHERE PEOPLE ARE LOCKED UP, I'M CONCERNED WHENEVER ANYBODY TALKS ABOUT ESCAPE. IT'S NOT UNCOMMON. IT DOESN'T NECESSARILY MEAN THAT THEY ARE PLANNING IT, THAT THEY ARE GOING TO BE WELL-ORGANIZED ENOUGH TO ACTUALLY BE ABLE TO DO IT, BUT YOU ALWAYS STAY ON GUARD FOR THAT. YOU ALWAYS STAY COGNIZANT THAT IS A POSSIBILITY. YOU ALWAYS MAKE SURE THAT THAT'S ONE OF THE THINGS YOU

ARE CONSIDERING WHENEVER YOU ARE [1952] DEALING WITH ANY OF THESE FELLOWS.

Q SO EVEN TALK ABOUT ESCAPE IS SERIOUS. I DIDN'T MEAN TO MINIMIZE IT.

A OKAY.

Q SO EVEN TALK ABOUT IT IS VERY SERIOUS?

A RIGHT.

Q SO YOU WOULD AGREE THAT IF THERE'S TALK ABOUT IT, FOLLOWED BY ACTION, WE ARE INTO A WHOLE NEW AREA, AREN'T WE?

A IT WOULD DEPEND ON THE ACTION, BUT YES, IT WOULD BE IN A NEW AREA.

Q AND YOUR OPINION ABOUT SOMEONE WHO MERELY TALKS ABOUT IT WOULD NOT BE THE SAME AS FAR AS THEIR ADAPTABILITY COMPARED TO SOMEONE WHO TALKS ABOUT IT AND TAKES ACTION ON IT?

A IT DEPENDS ON WHAT THE ACTIONS WERE.

Q OKAY. WOULD YOU AGREE WITH ME THAT TALKING ABOUT TAKING A CORRECTIONAL OFFICER HOSTAGE IS SERIOUS?

A VERY SERIOUS.

Q WOULD YOU AGREE WITH ME THAT ACTUALLY TAKING STEPS TO DO THAT IS BEYOND VERY SERIOUS?

A AGAIN, IT WOULD DEPEND ON WHAT STEPS, BUT IF THERE WERE STEPS TAKEN, THAT WOULD BE VERY SERIOUS, YES.

Q IN FACT, IF AN INMATE WERE STANDING WHO - STANDING BEHIND ONE OF THEIR CELL DOORS PURPOSEFULLY LURING A FEMALE [1953] CORRECTIONAL OFFICER WHO THEY HAD PICKED OUT BECAUSE OF HER - BASICALLY BECAUSE THE PERSON IS A PUSHOVER AND THEY KNOW THAT THEY COULD TAKE ADVANTAGE OF HER, STANDING WITH A SHANK LURING HER INTO THE CELL, LITERALLY GETTING TO THE POINT WHERE THE DOOR IS OPEN AND HAVING A SHANK IN HIS HAND READY TO TAKE THAT PERSON HOSTAGE, THAT'S PRETTY SERIOUS, ISN'T IT?

A I WOULD SAY THAT'S SERIOUS, YES, SIR.

Q AND YOU CERTAINLY WOULD CONSIDER THE FACT THAT THAT HAD HAPPENED ON A PRIOR OCCASION WHEN YOU ASSESS EVIDENCE THAT WOULD BE IN A CELL WHERE AN INMATE IS INVOLVED IN A BLOCK BEING - TRYING TO BE TAKEN OUT OF THE WALL?

A THAT ALSO - THAT'S SEPARATE, BUT I WOULD TAKE IT INTO CONSIDERATION ALSO.

Q IN ASSESSING THE ADAPTABILITY OF A PERSON WHO IS -

A YES.

Q - GOING TO GO INTO THE PRISON SYSTEM?

A RIGHT.

Q YOU ARE GOING TO TAKE ALL OF THAT INTO CONSIDERATION?

A YES, I AM.

Q AND WHEN YOU ARE ASSESSING WHETHER THEY ARE GOING TO BE AN ESCAPE RISK, YOU ARE CERTAINLY GOING TO TAKE INTO CONSIDERATION ANY PAST EVENTS, INCLUDING TALKING OR ACTIONS THAT SHOW A POTENTIAL, RIGHT?

A CORRECT.

[1954] Q YOU WOULD AGREE WITH ME THAT ACTUALLY DIGGING OUT AROUND THE MORTAR OF A CINDER BLOCK ON AN EXTERIOR WALL OF THE BUILDING AT THE JAIL IS AN ATTEMPT TO ESCAPE, WOULDN'T YOU?

A I ACTUALLY HAD PEOPLE DOING THAT ALL THE TIME WHEN I WAS WORKING AT KIRKLAND. NOT ALL OF THEM WERE TRYING TO ESCAPE. IN FACT, I WASN'T AWARE THAT ANY OF THEM WERE DOING THAT TRYING TO ESCAPE –

Q IS IT ART –

A I DON'T KNOW IF IT WAS AN ESCAPE ATTEMPT OR NOT. I KNOW THAT INMATES SIT THERE AND THEY DIG OUT THAT MORTAR ALL THE TIME. THEY ARE VERY WELL DESTRUCTIVE TO THE CELLS ALL THE TIME. I DON'T KNOW WHETHER OR NOT –

Q SO –

A – I DON'T KNOW WHETHER OR NOT TAKING MORTAR AROUND ONE CINDER BLOCK REALLY CONSTITUTES AN ESCAPE ATTEMPT OR NOT.

Q IS IT YOUR OPINION THAT THAT'S JUST DONE OUT OF BOREDOM? ARE YOU SAYING THAT THAT COULDN'T BE AN ESCAPE RISK?

A NO, I'M NOT.

Q OR AN ESCAPE ATTEMPT?

A I'M NOT SAYING IT COULD NOT BE.

Q ARE YOU SAYING IT'S ART WORK?

A I'M SAYING IT'S RANDOM DESTRUCTION. IT'S BOREDOM. [1955] IT COULD BE AN ESCAPE RISK OR AN ESCAPE ATTEMPT. FREQUENTLY, IT'S JUST, YOU KNOW, SOMETHING THESE GUYS DO. A LOT OF TIMES THEY CHISEL OFF THE MORTAR BETWEEN BLOCKS ON INTERIOR WALLS BETWEEN THE CELLS.

Q SO IN THIS CASE, YOU'RE SAYING ON AN EXTERIOR WALL WHERE THE MORTAR WAS REMOVED SIX OUT OF THE NINE INCHES THAT THAT WALL ACTUALLY ENCOMPASSED WASN'T AN ESCAPE ATTEMPT? THAT IT WAS DONE OUT OF BOREDOM?

A I DON'T KNOW THE PARTICULARS OF THAT INCIDENT. I KNOW THAT THAT WAS FOUND IN A ROOM WHERE MR. KELLY AND A NUMBER OF OTHER PEOPLE WERE. I DON'T KNOW THE PARTICULARS ABOUT IT. WHEN I ASKED HIM, HE SAID IT WAS LIKE THAT WHEN HE MOVED IN. I – YOU KNOW, I DON'T KNOW THE PARTICULARS. I –

Q THE PROBLEM – I'M SORRY.

A – I JUST DON'T KNOW.

Q DID YOU FOLLOW-UP ON THAT, WHETHER IT WAS LIKE THAT WHEN HE MOVED IN THERE?

A MY UNDERSTANDING IS THAT – AND I DIDN'T GET THIS FROM MR. KELLY – I GOT THIS FROM CONVERSATIONS WITH HIS ATTORNEY THAT THERE WAS INDICATION FROM OTHER PEOPLE THAT IT WAS LIKE THAT. THAT THE OTHER PEOPLE WHO WERE IN THAT ROOM SAID THAT AND THAT INMATES WHO WERE IN THAT ROOM BEFORE, BEFORE MR. KELLY EVER GOT THERE, SAID IT WAS LIKE THAT. BUT I HAVE NO DIRECT KNOWLEDGE. I GOT THAT THROUGH [1956] HIS ATTORNEY.

Q INMATES – I'M SORRY, COULD YOU – DID YOU SAY THAT THERE WERE INMATES THAT WERE IN THE ROOM BEFORE WILLIAM ARTHUR KELLY THAT SAID THAT HE WAS LIKE THAT?

A DID NOT SAY THAT TO ME. I GOT THAT FROM HIS ATTORNEY.

Q OKAY. SO YOU CERTAINLY DIDN'T TALK TO ANY INMATES THAT SAID THAT?

A NO.

Q BECAUSE IF THERE WERE RECORDS THAT SHOWED THAT THAT CELL WASN'T LIKE THAT ON AUGUST THE 6TH OF 1998, OF THIS YEAR, WOULD THAT SURPRISE YOU?

A YES, IT WOULD.

Q BUT YOU DIDN'T FOLLOW-UP ON IT?

A I DID NOT, NO.

Q AND YOU HAD ACCESS TO ALL THESE RECORDS. CERTAINLY, THE JAIL WASN'T SAYING YOU CAN'T GET INTO ANY OF THIS?

A I – NEVER SAW ANYTHING ABOUT IT.

Q SO YOU FORMED YOUR OPINION ON AN INCOMPLETE EVALUATION?

A IF THERE'S SOMETHING ABOUT THAT THAT I NEED TO SEE, I COULD TAKE A LOOK AT IT. I HAVE NOT SEEN ANYTHING ABOUT IT YET.

Q NOW, YOU DISCUSSED HOW WILLIAM ARTHUR KELLY WOULD BE – HAVE A TOUGH TIME GOING INTO THE POPULATION OVER IN ANY [1957] SORT OF AN INSTITUTION HERE IN THE STATE?

A A RELATIVELY TOUGH TIME.

Q DID YOU TALK TO ANY OF THE INMATES OVER AT THE DETENTION CENTER TO SEE HOW THEY FELT ABOUT WILLIAM ARTHUR KELLY?

A NO, I DID NOT.

Q SO YOU DIDN'T TALK TO THE INMATES WHO WERE SCARED OF WILLIAM ARTHUR KELLY?

A NO, I DIDN'T.

Q AND YOU DIDN'T TALK TO ANYBODY WHO, BASICALLY, SAID HIS SIZE DIDN'T MATTER?

A NO, I DIDN'T.

Q AND, IN FACT, IF YOU CARRY YOURSELF IN THE RIGHT WAY, YOU ARE GOING TO BE JUST FINE, NOT ONLY IN THIS DETENTION CENTER, BUT ALSO IN THE STATE FACILITY?

A I DIDN'T TALK TO ANY OF THE OTHER INMATES, NO.

Q IF YOU CARRY YOURSELF THE RIGHT WAY, YOU ARE GOING TO BE JUST FINE NO MATTER WHAT INSTITUTION YOU'RE IN, RIGHT?

A THAT'S – THAT'S GOOD ADVICE. I THINK THAT'S CORRECT.

Q IN FACT, YOU ALSO CONSIDERED FROM THESE RECORDS THAT WILLIAM ARTHUR KELLY WAS ACTUALLY WANTING TO GO INTO ONE OF THESE INSTITUTIONS, WASN'T HE?

A I SAW A NOTE ABOUT THAT, THAT HE WAS WANTING TO GET OUT OF THE JAIL AND INTO CORRECTIONS.

[1958] Q TO SET UP HIS HOUSE?

A RIGHT. THAT'S PRISON SLANG FOR A ROOM.

Q IT SOUNDS LIKE A PRETTY COMFORTABLE PLACE FOR HIM?

A I'M NOT SURE I WOULD DESCRIBE SOUTH CAROLINA'S PRISONS AS COMFORTABLE.

Q WELL, IT DOESN'T SOUND LIKE HE'S TOO WORRIED ABOUT IT?

A WORRIED IS A GENERAL TERM. I DID HEAR WORRIED ABOUT IT, BUT THE PRISONS ARE ACTUALLY NOT AS A BAD A PLACE AS THE COUNTY JAILS.

Q IN FACT, HE SAID, WHAT ELSE COULD THEY DO TO ME ONCE THEY PUT ME IN THERE?

A I'M NOT AWARE OF THAT.

Q YOU NOT READ THAT HE SAID THAT ON OCTOBER THE 7TH OF 1996? THAT HE SAID THAT IF HE GETS A LIFE SENTENCE, WHAT ELSE COULD THE SYSTEM DO TO HIM?

A I DON'T RECALL THAT, BUT THAT'S NOT AN UNUSUAL THING FOR PEOPLE TO SAY.

Q YOU ALSO DISCUSSED, DR. SHEA, THAT MR. KELLY ISN'T A VIOLENT PERSON FROM YOUR ASSESSMENT OF HIS HISTORY.

A I SAID THAT HE HAD NO EXTENSIVE PATTERN OF VIOLENCE. I THINK THAT THE INCIDENT THAT WE ARE TALKING ABOUT HERE PROVES THAT HE IS A VIOLENT PERSON, BUT WE DON'T HAVE A LONG PATTERN OF VIOLENCE.

Q DID YOU TAKE INTO CONSIDERATION HIS STATEMENT ABOUT [1959] TORTURING AND KILLING SMALL ANIMALS AS HE WAS GROWING UP?

A I TOOK THAT INTO ACCOUNT, YES.

Q THAT WASN'T A FACTOR? THAT'S NOT VIOLENT BEHAVIOR?

A THAT WAS A FACTOR AND I TOOK IT INTO ACCOUNT.

Q IT CERTAINLY WASN'T CAUSED BY ANY MENTAL ILLNESS?

A NO, IT WAS NOT.

Q COULD BE BECAUSE YOU'RE MEAN, RIGHT?

A COULD BE.

Q AND WE BOTH AGREE THAT WAS ABOUT AS VIOLENT AN ACT AS ONE CAN DO?

A ABSOLUTELY.

Q THANK YOU, DR. SHEA.

[1960] **DR. STEVEN SHEA –**
RE-DIRECT BY MS. FULLWOOD

* * *

Q OKAY. HE ASKED YOU ABOUT TATTOOS. DOES EVERY INMATE IN THE SYSTEM THAT HAS A TATTOO A GANG MEMBER?

A NO, THEY ARE NOT.

Q ARE TATTOOS RARE IN THE PRISON SYSTEM?

A NO, THEY ARE NOT.

Q DO YOU THINK –

A IN FACT, IF I COULD EXPLAIN – IF I COULD EXPOUND ON THAT?

Q SURE.

A THEY ARE ESPECIALLY NOT UNCOMMON IN SMALLER, YOUNGER INMATES WHO ARE TRYING TO MAKE THEMSELVES LOOK TOUGHER. THEY OFTEN EVEN GET TATTOOS ON THEIR FACE, TRYING TO MAKE THEMSELVES LOOK OLDER AND TOUGHER.

Q AND OTHER PRISONERS GIVE THEM THAT?

A OR THEY GIVE IT TO THEMSELVES. EITHER ONE, YES, THEY DO.

Q HOMEMADE TATTOOS?

A YES.

Q AND THEY ARE NOT AN INDICATION PER SE OF GANG MEMBERSHIP, ARE THEY?

A NO, NOT PERSONALLY.

[1963] **JAMES E. AIKEN –**
DIRECT BY MR. KIRKLAND

* * *

WE CALL MR. JAMES AIKEN.

JAMES E. AIKEN,

FIRST BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE CLERK: STATE YOUR FULL NAME FOR THE RECORD, PLEASE.

THE WITNESS: MY NAME IS JAMES EVANS AIKEN, A-I-K-E-N.

DIRECT EXAMINATION

BY MR. KIRKLAND:

Q MR. AIKEN, WHY ARE YOU HERE TODAY?

A I'VE BEEN ASKED TO PROVIDE EXPERT TESTIMONY IN THIS PARTICULAR CASE AS IT PERTAINS TO CORRECTIONAL MANAGEMENT.

[1974] * * *

Q OKAY. AND IS THAT BASED ON MORE WHAT YOU SAW IN HIS RECORD OR WHAT YOU DIDN'T SEE?

A WHAT WAS MOST INTERESTING TO ME IS WHAT WAS NOT IN HIS RECORD.

I MEAN, I'M NOT TRYING TO SAY THAT HIS RECORD WAS INSIGNIFICANT. WHAT I'M TRYING TO SAY AND AM SAYING WAS THAT THIS INDIVIDUAL HAD NO PRIOR CRIMINAL HISTORY, NO PRIOR CRIMINAL HISTORY PRIOR TO THIS PARTICULAR OFFENSE. THIS INDIVIDUAL DID NOT DEMONSTRATE BEHAVIORS OF TRYING TO TAKE OVER AND INVOLVE AND INFLUENCE OTHER PEOPLE IN THE MANAGEMENT OF THAT FACILITY. THIS INDIVIDUAL WAS NOT OR DID NOT PRESENT TO ME AS BEING A PREDATORIAL INSTITUTIONAL VIOLENT INDIVIDUAL.

Q OKAY. NOW, LET'S TALK ABOUT – YOU TALK ABOUT INSTITUTIONAL VIOLENT. WE ALL KNOW HE'S VIOLENT, RIGHT?

A YES.

[1975] * * *

Q IS THERE A DIFFERENCE BETWEEN WHAT YOU CALL OUTSIDE VIOLENCE AND INSTITUTIONAL VIOLENCE? HOW YOU WOULD LOOK AT THAT?

A YES. PEOPLE OFTEN DON'T UNDERSTAND THAT PRISONS ARE NOT THE COMMUNITY. THEY DON'T REPRESENT ALL OF THE COMMUNITY. WHAT THEY REPRESENT IS THOSE PEOPLE THAT CANNOT ADEQUATELY ADJUST AND PRESENT UNUSUAL RISK OF HARM TO THEIR PUBLIC. THAT'S WHAT PRISON IS ABOUT. SO YOU DON'T HAVE GOOD PEOPLE IN PRISON PER SE.

WHAT DO YOU HAVE? YOU HAVE PEOPLE IN THERE THAT ARE VERY VIOLENT, REDUNDANTLY VIOLENT. THEY NOT ONLY KILL ONE PEOPLE, THEY KILL MORE THAN ONE AND THEY DON'T HAVE – THEY – IT DOESN'T EVEN RAISE A BLOOD PRESSURE WITH THEM. ON TOP OF THAT IS THE WHOLE THING ABOUT THEM BEING IN PRISON IS SOMETHING FOR THEM TO ASPIRE TO, SO TO SPEAK.

WHAT I'M SAYING TO YOU IN ALL VERY SIMPLE LAYMAN'S LANGUAGE IS PEOPLE THAT ARE IN PRISON, ESPECIALLY IN A PRISON THAT HOUSES VIOLENT OFFENDERS, THAT MR. KELLY DOESN'T HOLD A LIGHT TO THEM IN A PRISON CONTEXT. HE'S SMALL. HE HAS NO REAL HISTORY. HE IS AN INDIVIDUAL THAT'S MARKED FOR A PRETTY TOUGH TIME IF HE IS NOT GIVEN THE CONTINUOUS OBSERVATIONS THAT'S GOING TO BE REQUIRED BECAUSE PREDATORIAL INMATES DON'T HAVE ANY

REMORSE TOWARDS ANOTHER INMATE. AND THEY ARE CONTINUOUSLY VIOLENT AND THEY ARE CONTINUOUSLY LOOKING AT WAYS TO BE VIOLENT AND I'M NOT [1976] TALKING ABOUT GESTURING. I'M TALKING ABOUT VIOLENCE. I'M TALKING ABOUT TAKING A SHANK THAT THAT'S LONG (INDICATES) AND PUTTING IT THROUGH YOU AND PULLING IT OUT AND THEN PULLING IT THROUGH AGAIN AND FOR NO REASON. AND WE HAVE SOME VERY VIOLENT PEOPLE IN OUR CORRECTIONAL SYSTEMS. WITH HIM COMING INTO THAT SYSTEM, HE WILL HAVE PROBLEMS.

Q THAT BRINGS UP AN INTERESTING POINT THAT I WANT TO ASK YOU ABOUT. ARE YOU AWARE OF AN INCIDENT INVOLVING A SHANK? DID YOU HEAR SOME TESTIMONY ABOUT THAT?

A YES, I –

Q AND AN OFFICER –

A – I READ IT IN THE INSTITUTIONAL FILES, YES.

Q AS A – AS MANAGING CORRECTIONS, WHAT KIND OF CONCERNS WOULD THAT CAUSE YOU AND WHAT WOULD YOU DO IN RESPONSE TO THAT?

A WELL, THE GENERAL CONCERN WOULD BE, YOU KNOW, OBVIOUSLY IT FITS THE NOMENCLATURE OR THE GENERAL RULE OF A SHANK, BUT THERE ARE SHANKS AND THERE ARE SHANKS. YOU KNOW, HAVING A TOOTHBRUSH THAT'S MELTED DOWN WITH A RAZOR BLADE ON, YES, IT CAN

HARM SOMEONE. AND WHAT ALSO BROUGHT TO MY ATTENTION IN DEALING WITH AGGRESSIVE PREDATORIAL TYPE INMATE POPULATION, WHAT I FOUND IN MY PROFESSIONAL CAREER, THOSE TYPE OF PEOPLE YOU DON'T FIND SHANKS ON.

Q WHAT DO YOU MEAN BY THAT? WHY WOULDN'T THEY CARRY A SHANK?

[1977] A BECAUSE THEY HAVE GOT OTHER PEOPLE TO CARRY IT FOR THEM. THEY CONTROL. THEY ARE PREDATORS. THEY DON'T CARRY THE WEAPONS ON THEM BECAUSE THEY DON'T NEED PROTECTION. YOU CARRY WEAPONS ON YOU FOR PROTECTION AND PEOPLE GESTURE BY MAKING SMALL WEAPONS AND THOSE TYPES OF THINGS. WHAT I FOUND IN MY PROFESSIONAL EXPERIENCE IS THAT REAL SHANKS ARE ONLY CARRIED BY PEOPLE WHO WORK FOR PEOPLE AND THOSE ARE NOT PREDATORIAL PEOPLE. THOSE ARE PEOPLE THAT WE, FOR LACK OF A BETTER WORD, CALL THEM WIMPS. THOSE PEOPLE ARE CONTROLLED BY THE POWER SOURCE WITHIN THAT FACILITY.

Q IF YOU HAD A SITUATION, ASSUMING FOR A MOMENT THAT WHAT YOU READ WAS TRUE AND THAT BILLY KELLY HAD THIS SHANK ON HIM, AND MANAGEMENT OF CORRECTIONS, HOW WOULD THAT TYPICALLY BE HANDLED? ARE THERE PROCEDURES IN PLACE?

A YES, CERTAINLY. YOU CONDUCT SHAKEDOWNS AROUND THE AREAS. YOU INTERROGATE THE INDIVIDUAL TO SEE HOW, WHEN AND WHERE, YOU KNOW, THIS WAS MADE. YOU CHECK THE CELL

AREA WITH OTHER INMATES LIVING IN IT TO MAKE SURE THAT THAT'S DONE AND YOU TAKE THEM BEFORE THE ADJUSTMENT COMMITTEE AND AN ADJUSTMENT COMMITTEE BEING AN INTERNAL ADMINISTRATIVE PROCESS AND YOU MAKE A DECISION IN RELATIONSHIP TO IT'S A FAIRLY SEVERITY OF THE CASE, WHAT TYPE OF PUNISHMENT SHOULD BE RECEIVED. AND I THINK, IF I'M NOT MISTAKEN, HE RECEIVED SEVERAL DAYS ON ADMINISTRATIVE LOCKUP OR CELL CONFINEMENT, IF I'M NOT MISTAKEN.

[1978] Q AND ARE THERE – IN THE PRISON SYSTEM, ARE THERE THINGS IN PLACE FOR DISCIPLINARY VIOLATIONS LIKE THAT?

A YES.

Q WHAT KIND OF THINGS OCCUR?

A WELL, YOU HAVE AN ADMINISTRATIVE HEARING. YOU HAVE A PROPER INVESTIGATION AND IF THERE IS A FINDING OF GUILT, THEN PUNISHMENT IS GIVEN WHERE YOU DON'T HAVE TO GO TO A COURT OF LAW FOR THAT TO BE ADMINISTERED. IT CAN BE ADMINISTERED BY TAKING GOOD TIME AWAY FROM PEOPLE OR CONFINING TO A CELL FOR A PARTICULAR PERIOD OF TIME, ET CETERA.

Q OKAY. AND ARE THERE SPECIAL LOCKUPS AND THINGS LIKE THAT?

A YES. YOU HAVE SPECIAL CONFINEMENT AREAS FOR THAT TYPE OF POPULATION WHERE THAT INMATE IS IN SORT OF THE JAIL FOR THE JAIL,

SO TO SPEAK. SO IF A PERSON DOES NOT DEMONSTRATE THE BEHAVIORS THAT YOU WOULD EXPECT, THAT PERSON COULD BE LOCKED UP THERE. BUT WITH THE SAME TOKEN, IF THAT INDIVIDUAL VIOLATES THE LAWS OR RULES THAT REQUIRES LETHAL FORCE, THAT PERSON CAN BE KILLED BY THE OFFICIALS.

Q I WANT TO BRING IT TO YOUR ATTENTION ANOTHER INCIDENT. DID YOU READ IN THE REPORT ANYTHING ABOUT A MORTAR IN A BLOCK BEING SCRAPED OUT?

A YES.

Q AND HAVE YOU HAD – I DON'T KNOW IF YOU HEARD ANY – [1979] DID YOU HEAR ANY TESTIMONY ON THAT AT ALL?

A I HEARD PART OF IT THIS MORNING.

Q WHAT IS THE SIGNIFICANCE OF THAT PARTICULAR INCIDENT?

A WELL, THE SIGNIFICANCE OF IT, YOU KNOW, OBVIOUSLY IN A CORRECTIONAL ENVIRONMENT, YOU DON'T FORGET ABOUT ANYTHING BECAUSE YOU END UP BEHIND THE EIGHT-BALL. BUT THE THINGS THAT I LOOK AT WHEN WE LOOK AT SOMEONE DIGGING OUT AROUND A WINDOW OR DIGGING A CELL BLOCK, YOU KNOW, IS THIS AN ESCAPE ATTEMPT OR IS THIS DESTRUCTION OF PROPERTY AND DESTRUCTION OF PROPERTY OBVIOUSLY IS THAT, DID THIS TAKE PLACE.

AND THEN IN MAKING CONSIDERATION OF AN ESCAPE ATTEMPT, YOU KNOW, I TAKE INTO CONSIDERATION AT LEAST THE PRISONS THAT I OPERATED MOSTLY, ESPECIALLY OF NEW DESIGN. YOU DON'T JUST HAVE THE CINDER BLOCK. YOU KNOW, AND YOU'VE PROBABLY SEEN CINDER BLOCKS WITH THE HOLES IN THE MIDDLE. WELL, IN A PRISON, YOU DON'T JUST PUT THOSE BLOCKS THERE. WHAT YOU DO IS YOU SET THE BLOCKS IN CONCRETE AND THEN YOU POUR THE CONCRETE INTO THE BLOCKS AND BEFORE YOU EVEN DO THAT, YOU PUT WHAT IS KNOWN AS RE-BAR, WHICH IS STEEL RODS AND THEY RANGE FROM A HALF-INCH, A QUARTER INCH, WHATEVER, DOWN THERE AND THEN YOU IMPACT IT WITH THE CONCRETE BECAUSE INMATES IN FACILITIES THAT I'VE MANAGED THAT WERE UNDER FAIRLY NEW CONSTRUCTION, THEY CAN PICK AWAY ALL THEY WANT. IF THEY CAN GET THROUGH THAT CONCRETE AND GET THROUGH THAT STEAL RE-BAR, THE STAFF IS NOT DOING THEIR JOB. BECAUSE [1980] ITS GOING TO TAKE A LONG TIME WITH PEOPLE NOT OBSERVING AND PEOPLE NOT DOING THEIR JOBS. AND THEN WHEN THAT INDIVIDUAL GETS THROUGH ALL OF THAT, THEY'VE STILL GOT TO GO THROUGH THE PERIMETER AND THAT'S THE FENCE ON THE OUTSIDE WHERE YOU HAVE, YOU KNOW, WHAT'S – THEY DON'T EVEN USE BARBWIRE ANYMORE. THEY USE WHAT WE CALL AS MAN-BARRIER WIRE AND MAN-BARRIER WIRE IS SHARP AS RAZOR BLADES AND WHEN YOU HIT IT, IT FLIES OUT AT YOU AND ENCOMPASSES YOU AND JUST

CUTS YOU TO SMITHEREENS AND WE ARE NOT EVEN TALKING ABOUT THE ELECTRONIC SURVEILLANCE SYSTEMS WITHIN THE PERIMETER. AND WE ARE NOT TALKING ABOUT OFFICERS ARMED WITH AUTOMATIC WEAPONS TO STOP AN' ESCAPE ATTEMPT ON TOP OF THAT.

SO WHEN YOU LOOK AT IT, IT'S NOT MINIMIZING IT, BUT THESE ARE THE STEPS AND THESE ARE THE THINGS THAT I CONSIDER WHEN I'M RENDERING DECISIONS AS TO AN INDIVIDUAL'S INVOLVEMENT IN THESE TYPE OF ACTIVITIES.

[1981] * * *

MR. KIRKLAND: LET ME ASK YOU THIS. IN YOUR EXPERIENCE IN TERMS OF WHERE PEOPLE ARE ASSIGNED AND CLASSIFICATION, THE OFFENSE IS CONSIDERED?

THE WITNESS: YES. THE OFFENSE IS, AS I STATED PREVIOUSLY, YES.

Q NOW, LET'S ASSUME FOR A MOMENT THAT EVERYTHING IN BILLY KELLY'S JAIL RECORD IS TRUE AND WE KNOW ALREADY THAT HE'S GUILTY OF A VERY VIOLENT OFFENSE. SO ASSUMING ALL THAT TO BE TRUE, CAN THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS IN YOUR OPINION MANAGE HIM AS AN INMATE?

A THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS IS NOT ONLY CAPABLE OF MANAGING THIS INMATE, IN MY CANDID OPINION, HAS

TAKEN A NATIONAL LEAD IN MANAGING THIS TYPE OF INMATE POPULATION.

[1984] **JAMES E. AIKEN – CROSS BY MR. MYER**

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Q AND YOU WERE TALKING ABOUT IF THERE WAS AN INFRACTION, THAT THERE WOULD BE AN ADMINISTRATIVE HEARING WITH THE PRISONER THERE. AND THEN, BASED ON THE OUTCOME OF GUILT, THEN CERTAIN THINGS COULD TAKE PLACE AND THAT BEING YOU COULD TAKE AWAY HIS GOOD TIME –

MR. KIRKLAND: OBJECTION, YOUR HONOR –

MS. FULLWOOD: OBJECTION, YOUR HONOR.

[1985] THE SOLICITOR: WELL, THAT'S WHAT THEY BOUGHT OUT ON DIRECT.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, I HAVE A MATTER OF LAW I NEED TO TAKE UP WITH THE LAWYERS.

I'M GOING TO SEND YOU TO THE JURY ROOM. WHILE YOU ARE THERE, PLEASE DO NOT DISCUSS THIS CASE AMONG YOURSELVES. WE'LL GET YOU BACK IN JUST A MOMENT.

(JURY OUT.)

THE COURT: YES, SIR.

MR. KIRKLAND: YOUR HONOR, MR. MYERS KNOWS THERE ARE NO GOOD TIME CREDITS IN A LIFE SENTENCE.

THE SOLICITOR: I'LL BE GLAD FOR THIS LADY TO READ BACK HIS ANSWER ON DIRECT. AND I WROTE IT DOWN RIGHT HERE.

MR. KIRKLAND: I DON'T DISPUTE THE FACT –

THE COURT: JUST ONE MOMENT. NOW, HE'S ON CROSS-EXAMINATION. IF HE HAS MADE SOME TYPE – HE'S AN EXPERT. HE'S COME IN HERE AND YOU'VE QUALIFIED HIM AS AN EXPERT, SO READ ME YOUR – READ ME THE ANSWER BACK, SOLICITOR, AND IF I HAVE TO –

THE SOLICITOR: THEY WERE ASKING ABOUT ADMINISTRATIVE HEARINGS RELATING TO THE SHANK AND HE SAID THERE WOULD BE A HEARING AND BASED ON A DETERMINATION OF GUILT, THAT THERE WOULD BE SOME SANCTIONS IMPOSED, INCLUDING TAKING AWAY GOOD TIME, PUTTING THEM IN LOCKUP, [1986] WHICH HE CLASSIFIED AS THE JAIL FOR THE JAIL, AND THEY COULD DO OTHER THINGS, INCLUDING, I THINK, HE SAID MAYBE BRINGING CRIMINAL CHARGES LATER ON.

NOW, THAT'S WHAT THEY BROUGHT OUT. I SAT HERE AND KEPT MY MOUTH SHUT AND LISTENED TO THEM.

THE COURT: WHAT'S YOUR OBJECTION NOW?

MR. KIRKLAND: YOUR HONOR, HE CANNOT PUT OUT INFORMATION FOR A JURY TO BASE THEIR SENTENCE ON.

MR. AIKEN WAS SPEAKING GENERICALLY IN THOSE TERMS. AND I THINK THAT THE ONLY REASON IT IS BEING BROUGHT OUT IS TO MISLEAD THE JURY ABOUT THE SENTENCE, TO MAKE THEM BELIEVE THAT A PERSON WITH LIFE GETS CREDIT FOR GOOD TIME. THAT'S THE ONLY REASON IT'S BEING BROUGHT OUT. AND I ASKED, MR. MYERS, IF THERE IS ANY OTHER REASON FOR THAT. I CAN'T IMAGINE WHAT THERE WOULD BE.

THE COURT: WELL, IF THIS MAN IS AN EXPERT, HE WILL BE ABLE TO EXPLAIN THAT THEN.

MR. KIRKLAND: YOUR HONOR, I THINK IT'S AN IMPROPER QUESTION.

THE COURT: MR. KIRKLAND, IT – MR. KIRKLAND, YOU KNOW, THE THING ABOUT IT. WHENEVER YOU BRING A WITNESS TO TESTIFY AND I UNDERSTAND THE REASON THAT YOU ARE BRINGING THESE WITNESSES TO TESTIFY. WHEN THEY MAKE STATEMENTS ON DIRECT EXAMINATION, THEN THEY ARE SUBJECT TO CROSS-EXAMINATION ON THOSE. AND, ONCE AGAIN, THAT IS THE [1987] PURPOSE OF DIRECT, CROSS, REDIRECT AND RECROSS. AND IF THERE'S SOMETHING THAT NEEDS TO BE CLARIFIED, YOU MAY DO SO. HE IS AN EXPERT. I'M SURE THAT HE'S TESTIFIED A NUMBER

OF TIMES AND HE'LL PROBABLY BE ABLE TO CLEAR IT UP AND ANSWER IT HIMSELF, BUT I THINK THAT IT'S A PROPER QUESTION.

IF YOU WANT THE COURT REPORTER TO PLAY IT BACK TO ME, I'LL BE GLAD FOR HER TO DO IT FOR ME.

MR. KIRKLAND: JUST ONE MOMENT, YOUR HONOR.

YOUR HONOR, I WOULD LIKE TO RAISE A COUPLE OTHER MATTERS THAT I WOULD LIKE TO PUT ON THE RECORD.

THE COURT: ALL RIGHT.

MR. KIRKLAND: THIS IS SOMETHING THAT MR. KELLY HAS ABSOLUTELY NO CONTROL OVER, THE TERMS OF HIS INCARCERATION –

THE COURT: YES, SIR.

MR. KIRKLAND: – IN ADDITION TO THAT, I MEAN, THESE ARE THINGS THAT ARE OUT BY OUR LEGISLATURE. NOT THAT MR. AIKEN IS INVOLVED IN. AND I DON'T THINK THOSE ARE PROPER THINGS TO PUT BEFORE THE JURY.

SO – AND I'M GOING TO FINISH UP. AND MY LAST POINT IS –

THE COURT: ALL RIGHT.

MR. KIRKLAND: – AND IT'S JUST SORT OF REITERATION. IT'S OF NO CONCERN OF THE JURY

WHAT HAPPENS [1988] TO HIM AFTER INCARCERATION IN TERMS OF THE WAY THE SENTENCES ARE HANDLED BECAUSE THAT'S ALL DONE BY STATUTE.

THE COURT: WELL, THEN – YOU KNOW, YOU HAVE ASKED HIM QUESTIONS ABOUT THAT.

MR. KIRKLAND: YOUR HONOR, I'M TALKING ABOUT IN PARTICULAR ABOUT THE FRAMEWORK OF THE SENTENCE ITSELF. WHETHER IT'S GOOD TIME, PAROLE OR ANYTHING LIKE THAT. THOSE ARE THINGS THAT THE JURY ARE NOT SUPPOSED TO CONSIDER.

THE COURT: I THINK THAT ANY TIME WE START TALKING ABOUT PAROLE ELIGIBILITY, THAT THOSE ARE CLEARLY IMPROPER AND NOT FOR THE JURY'S CONSIDERATION. BUT YOU KNOW I CAN CHARGE THEM AT THE APPROPRIATE TIME AS TO THE MEANINGS OF A SENTENCE IN THIS STATE, BUT, YOU KNOW, I'M HAVING A DIFFICULT TIME WHEN HE COMES IN AND TESTIFIES AS TO CERTAIN THINGS ON DIRECT EXAMINATION WHY THE SOLICITOR CAN'T GET INTO THEM ON CROSS AND THEN HIM EXPLAIN OR YOU CLARIFY IT ON REDIRECT. YOU KNOW, ONCE AGAIN, THIS IS A MAN WHO, FROM MY LISTENING TO HIS TESTIMONY, HAS TRAVELED THIS COUNTRY FAR AND WIDE. HE'S EVEN BEEN OUT OF THE COUNTRY IN POSSESSIONS PERFORMING FUNCTIONS. HE IS AN EXPERT IN THIS FIELD AND WHY SHOULD I LIMIT THE STATE'S QUESTIONING OF HIM INSOFAR AS TRYING TO ESTABLISH OR GET TO THEIR LINE OF QUESTIONING.

SOLICITOR, HOW ABOUT ASKING YOUR QUESTION OF HIM [1989] AND LET ME HEAR WHAT HIS ANSWER IS GOING TO BE.

THE SOLICITOR: WHEN YOU SAID ADMINISTRATIVE HEARINGS AND SOMEONE IS FOUND GUILTY, THERE ARE SEVERAL SANCTIONS OR PENALTIES THAT COULD BE IMPOSED. YOU SAID YOU COULD TAKE AWAY HIS GOOD TIME, YOU COULD PUT HIM IN LOCKDOWN OR LOCKUP, AS THEY SAID, WHICH YOU SAID WAS A JAIL FOR THE JAIL, OR OTHER TYPE OF PUNITIVE MEASURES COULD BE IMPOSED. IS THAT WHAT YOU SAID BASICALLY, MR. AIKEN?

A IN GENERIC TERMS. IT WAS ASKED ME IN GENERIC TERMS WHAT – YES. THE ANSWER IS YES.

Q THANK YOU.

MR. KIRKLAND: YOUR HONOR, I JUST WANT TO RAISE AND I'M GOING TO CITE A CASE THAT MS. FULLWOOD HAS VERY GRACEFULLY HANDED TO ME, *GARNER VERSUS FLORIDA*. IT TALKS ABOUT WHERE A DEFENDANT CANNOT EXPLAIN OR CONTROL THE CONDITIONS OF INCARCERATION.

I JUST WANT TO PUT THAT A VIOLATION OF THE EIGHTH AMENDMENT, A VIOLATION OF THE LAW OF THAT CASE IN TERMS OF EVER GETTING INTO THAT, DISCUSSING.

THE COURT: WHAT SAYS THE STATE ABOUT THAT?

THE SOLICITOR: I'M NOT ASKING HIM ABOUT HIM CONTROLLING HIS INCARCERATION. I'M JUST ASKING HIM SOME STUFF ON CROSS-EXAMINATION TO WHICH HE TESTIFIED ON DIRECT. I DIDN'T ASK HIM THOSE QUESTIONS ON DIRECT. HE'S NOT MY WITNESS. BUT I DON'T THINK MY HAND SHOULD BE TIED ON ME [1990] CROSS-EXAMINING HIM BASED ON INFORMATION THEY DIRECTLY BROUGHT OUT AND THAT'S *STATE VERSUS RAYMOND PATTERSON*.

THE COURT: SUSTAIN THE OBJECTION.

NOW, I'M GOING TO OVERRULE YOUR OBJECTION, ALLOW HIM TO ASK THE QUESTION. I THINK THAT IT IS A PROPER QUESTION FOR CROSS-EXAMINATION AND I'M GOING TO ALLOW HIM TO – THIS MAN TO ANSWER IT.

IF HE NEEDS TO EXPLAIN IT, IF YOU NEED TO CLEAR IT UP ON REDIRECT, YOU MAY DO SO.

THE SOLICITOR: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

LET'S BRING OUR JURY BACK.

SO THE RECORD IS CLEAR, THE OBJECTION OF THE DEFENSE IS OVERRULED.

(JURY IN.)

THE COURT: THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

ALL RIGHT, SOLICITOR.

THE SOLICITOR: THANK YOU, YOUR HONOR.

CONTINUED CROSS-EXAMINATION

BY MR. MYERS:

Q NOW, I WAS ASKING YOU, MR. AIKEN, YOU WERE TALKING ABOUT THAT SHANK AND THEY WERE ASKING YOU ABOUT HAVING SHANKS OR CONTRABAND, WHAT WOULD BE DONE. AND YOU SAID THERE WOULD BE ADMINISTRATIVE HEARINGS WITH THE INMATE [1991] THERE, THE PRISONER THERE?

A YES.

Q AND A DETERMINATION –

A USUALLY YOU WOULD HAVE SOMEONE – USUALLY THE INMATE WOULD AND CAN REQUEST TO BE PRESENT, YES.

Q AND UPON FINDING THAT THIS ACTUALLY HAPPENED, THEN THERE ARE CERTAIN SANCTIONS TO BE IMPOSED AND YOU LISTED OUT SOME?

A YES.

Q YOU TALKED ABOUT TAKING AWAY GOOD TIME, DIDN'T YOU?

A GENERICALLY SPEAKING –

Q YES, SIR –

A – AND WHEN I SAY GENERICALLY, WE ARE NOT TALKING ABOUT THIS PARTICULAR CASE.

Q NO. CERTAINLY NOT. WE ARE TALKING ABOUT – YOU SAID LOCKDOWN OR LOCKUP AND YOU TERMED IT PUTTING THEM IN A JAIL IN THE JAIL?

A THAT IS CORRECT.

Q AND COULD IMPOSE OTHER SANCTIONS?

A THAT IS CORRECT.

Q AND THAT QUESTION WAS ASKED IN REGARD TO A SHANK THAT THE DEFENDANT HAD AT THE LEXINGTON COUNTY JAIL?

A I UNDERSTOOD THE QUESTION OF A PERSON HAVING POSSESSION OF A SHANK GENERICALLY. NOT THIS PARTICULAR INDIVIDUAL IN THIS PARTICULAR CASE.

[1992] Q OH, I THOUGHT IT WAS ASKED ABOUT THIS CASE IN REGARD TO THAT SHANK.

A SAID AREN'T THERE ADMINISTRATIVE HEARINGS, AND, YES, ADMINISTRATIVE HEARINGS DO TAKE PLACE.

NOW, AS FOR THE MERITS AND THE DISPOSITION OF THIS PARTICULAR CASE, I THINK THEY CONFINED HIM IN HIS CELL FOR A PERIOD OF TIME, IF I'M NOT MISTAKEN.

Q BUT YOU DON'T KNOW IF THE LEXINGTON COUNTY JAIL HAS A PROCEDURE WHERE THEY HAVE ADMINISTRATIVE HEARINGS AND THEY DO

ALL THIS STUFF? YOU'RE TALKING SOME OTHER – JUST A HYPOTHETICAL IN SOME PRISON SOMEWHERE?

A THAT'S CORRECT. I DO KNOW, BASED ON THE RECORDS THAT I READ, THE LEXINGTON COUNTY JAIL, SOME TYPE OF PROCESS TOOK PLACE AND THE OFFICIALS OF THAT FACILITY MADE A DISPOSITION IN THE CASE.

Q AND THEY ASKED YOU ABOUT PEOPLE CHISELLING AROUND A BLOCK. I THOUGHT IT WAS ABOUT THIS CASE TO BE FRANK WITH YOU. AND CHISELLING CONCRETE AND MORTAR FROM AROUND A BLOCK IN A CELL AND YOU WENT INTO DETAIL ABOUT THE CONSTRUCTION OF A PRISON. YOU TALKED ABOUT THE BLOCKS AND THE CEMENT BEING DOWN THERE AND THE METAL BARS AND THE RAZOR BLADE WIRES AND THE PERIMETER GUARD.

A MY RESPONSE TO THAT, SIR, WAS IN RELATIONSHIP TO WHAT I WOULD CONSIDER IF I FOUND PLACES AROUND WINDOWS OR WHATEVER REMOVED, IS THIS DESTRUCTION OF PROPERTY, COUNTY [1993] PROPERTY IN THIS PARTICULAR CASE OR STATE PROPERTY OR FEDERAL PROPERTY OR IS THIS A VALIDATED ESCAPE ATTEMPT AND WHAT ARE SOME OF THE THINGS THAT I TAKE UNDER CONSIDERATION AS A CORRECTIONAL ADMINISTRATOR IN MAKING – IN RENDERING THOSE TYPE OF DECISIONS.

Q AND, OF COURSE, IF THAT BLOCK DID HAVEN'T STEEL RODS IN IT OR CEMENT POURED

DOWN IN IT OR THERE WASN'T THIS HIGH TECH RAZOR BLADE WIRE AND THERE WASN'T A PERIMETER GUARD OUT THERE AND THAT WOULD MAKE A DIFFERENT DETERMINATION?

A YES, IT WOULD. IT WOULD MAKE A - IT WOULD REALLY CAUSE ME A GREAT DEAL OF CONCERN TO HAVE THIS TYPE OF PERSON ACCUSED OF THIS TYPE OF OFFENSE HOUSED IN THAT TYPE OF AREA. I MEAN, YOU HAVE TO ASSUME THAT THIS INDIVIDUAL IS A MAXIMUM SECURITY INMATE, AND EVEN THOUGH HAS NOT BEEN ADJUDICATED, THAT WE HAVE TO MAKE SURE THAT THIS INDIVIDUAL DOESN'T HAVE ANY OPPORTUNITY TO DO ANYTHING UNTIL THE COURT OF LAWS MAKE A DECISION.

Q DID YOU KNOW THE LEXINGTON COUNTY CELL HE WAS IN DID NOT HAVE THE CONCRETE POURED IN THERE AND IT DIDN'T HAVE ANY METAL RODS?

A I HAVE NO PERSONAL KNOWLEDGE OF THAT.

Q IT DIDN'T HAVE GUARDS OUT PAST IT?

A I HAVE NO PERSONAL KNOWLEDGE OF THE CONSTRUCTION OF THAT PARTICULAR - ALL I'M SAYING VERY SIMPLY IS THAT IF I'M HOUSING THIS TYPE OF INMATE, I WANT TO MAKE SURE THAT [1994] THE PUBLIC IS PROTECTED AND THAT INMATE IS USUALLY HOUSED IN THAT TYPE OF DESIGN FACILITY.

Q THE MOST SECURE FACILITY IN SOUTH CAROLINA IS DEATH ROW, ISN'T IT?

A NOT NECESSARILY.

MR. KIRKLAND: OBJECTION, YOUR HONOR.

THE COURT: STATE YOUR GROUND.

MR. KIRKLAND: SIDE BAR, YOUR HONOR.

(WHEREUPON, A BENCH CONFERENCE WAS HELD AT THIS TIME OFF THE RECORD.)

THE COURT: OBJECTION IS OVERRULED.

THE SOLICITOR: THANK YOU.

ISN'T IT TRUE THAT DEATH ROW IS THE MOST SECURE FACILITY IN SOUTH CAROLINA?

THE WITNESS: IN SOUTH CAROLINA?

Q YES, SIR.

A MY UNDERSTANDING IS THAT DEATH ROW POPULATION IS NOT HOUSED IN A SEPARATE PRISON. DEATH ROW POPULATION IS HOUSED IN A PORTION OR A COMPONENT OF A MAJOR FACILITY. SO, YES, IT WOULD BE - DEATH ROW POPULATION WOULD BE HOUSED IN THE MOST SECURE AREA, THE MOST SECURE PRISON, BUT THE POINT IS, IS THAT THAT'S ONLY ONE SMALL PART OF A MAJOR PRISON THAT IS EQUALLY SECURE.

Q IN THAT ONE SMALL PART, DEATH ROW, THAT'S THE MOST SECURE IN SOUTH CAROLINA?

[1995] **JAMES E AIKEN – RE-DIRECT BY MR KIRKLAND**

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A NOT NECESSARILY SO.

Q THANK YOU.

THE COURT: MR. KIRKLAND.

REDIRECT EXAMINATION

BY MR. KIRKLAND:

Q MR. AIKEN, LET ME CLEAR UP A COUPLE OF THINGS HERE. I'M GOING TO ASK YOU AGAIN THIS PARTICULAR QUESTION. ASSUMING EVERYTHING THAT MR. MYERS ASKED YOU TO BE TRUE, THE WORSE CASE SCENARIO, BILLY KELLY WAS TRYING TO CUT HIS WAY OUT, BILLY KELLY HAD A SHANK, COULD A FACILITY IN YOUR OPINION IN SOUTH CAROLINA COULD THAT TYPE OF INMATE BE HANDLED FOR THE REST OF HIS LIFE?

A YES. THAT INDIVIDUAL CAN BE ADEQUATELY MANAGED NOT TO PRESENT THE RISK OF HARM TO THE PUBLIC, STAFF, OTHER INMATES. THE STATE OF SOUTH CAROLINA IS VERY CAPABLE TO TAKE WHATEVER MEASURES IS NECESSARY TO PREVENT THIS FROM HAPPENING.

I, AS A CORRECTIONAL COMMISSIONER IN INDIANA, HAVE KILLED INMATES TO PREVENTS [sic] THAT FROM HAPPENING. SO, I'M NOT TALKING ABOUT HYPOTHETICAL SITUATIONS. WHAT I AM

SAYING IS THAT THIS STATE IS MORE THAN CAPABLE OF MANAGING THAT POPULATION, THAT INDIVIDUAL IN THE CONFINES OF THEIR FACILITIES.

Q IF BILLY KELLY DID THESE TYPES OF ACTIVITIES INSIDE AN INSTITUTION, COULD HE BE SECURED IN A PLACE JUST AS [1996] SECURE AS DEATH ROW?

A PROBABLY MORE SECURE. I MEAN, WHEN I SAY MORE SECURE, THAT WOULD BE IN A LOCKUP AREA THAT HAS MORE SHAKEDOWNS, A LOCKUP AREA THAT HAS CLOSER SUPERVISION, VISITING MONITORING EVEN CLOSELY BECAUSE THESE INDIVIDUALS HAVE DEMONSTRATED THOSE BEHAVIORS WITHIN A CORRECTIONAL ENVIRONMENT THAT CONTINUED THEIR VIOLENT WAYS AND WE HAVE WAYS OR THEY HAVE WAYS NOW TO MANAGE THAT TYPE OF POPULATION.

Q IS THAT SOMETHING THAT'S DONE EVERY SINGLE DAY IN THE DEPARTMENT OF CORRECTIONS?

A EVERYDAY. EVERYDAY.

Q IS THAT THEIR PURPOSE TO HANDLE PEOPLE LIKE BILLY KELLY?

A THAT'S WHAT WE ARE IN BUSINESS FOR AND PEOPLE MUCH WORSE THAN BILLY KELLY.

Q THANK YOU.

[1999] **MOTIONS**

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MS. FULLWOOD: YOUR HONOR, WE DO HAVE ONE REQUEST TO CHARGE.

OF COURSE, AT THIS TIME, I WOULD RENEW THE MOTIONS I MADE AT THE CLOSE OF THE STATE'S CASE.

THE COURT: YES, MA'AM.

ALL RIGHT. THE MOTIONS THAT WERE MADE AT THE END OF THE STATE'S CASE, I BELIEVE THAT THAT WAS –

MS. FULLWOOD: THAT WAS FOR A DIRECTED VERDICT OR TO STRIKE THE TORTURE –

THE COURT: AS TO THE PHYSICAL TORTURE –

MS. FULLWOOD: YES, SIR.

THE COURT: – YES, MA'AM.

THE MOTION IS DENIED.

LET ME ASK YOU THIS, MS. FULLWOOD. THIS CHARGE THAT YOU HAVE GIVEN ME, I BELIEVE, THAT THAT WAS EFFECTIVE 5/20 OF '96, IF I'M NOT MISTAKEN AND DID THIS NOT OCCUR 1/5/96.

MS. FULLWOOD: YOUR HONOR, WHAT I HAVE IS –

THE COURT: YOURS MAY BE A LITTLE MORE CURRENT THAN MINE.

MS. FULLWOOD: – THAT PART OF THE CODE FROM THE SUPPLEMENT.

[2000] NOW, WHEN I LOOK AT THE STATUTORY HISTORY HERE, IT REFERS TO 1995 ACT NUMBER 83, EFFECTIVE JANUARY 1 OF '96, AND THEN IN THE EDITOR'S NOTE, IT STATES THAT THAT AMENDMENT WAS A SUBSTANTIAL REVISION [sic] THE 1996 PROVISION THAT WAS EFFECTIVE MAY 20TH. IT STATES THAT IF I ADDED SUB-ITEM ONE IN SUBSECTION C, WHICH WOULD BE – OH, MY GOODNESS. IT LOOKS LIKE IT AMENDED AGGRAVATING CIRCUMSTANCES. I DON'T HAVE THE TEXT OF EITHER OF THOSE ACTS.

THE COURT: YOU KNOW, I KNOW WHEN THE ACT WAS REVISED AND MAYBE Y'ALL CAN ALL GIVE ME SOME GUIDANCE HERE. I'M TRYING TO, I GUESS, FIND OUT IS THIS –

MS. FULLWOOD: JUDGE, JUST READING THE NOTES IN THE STATUTORY HISTORY, IT SAYS THAT THE ACT EFFECTIVE MAY 20TH OF '96 ADDED THE AGGRAVATING CIRCUMSTANCE OF MURDER OF A WITNESS OR A POTENTIAL WITNESS COMMITTED ANY TIME DURING THE CRIMINAL PROCESS. THAT'S THE ONLY REVISION IT NOTES WHEREAS THE PROVISION –

THE COURT: OTHER PROVISIONS WERE EFFECTIVE JANUARY 1 OF '96.

MS. FULLWOOD: YES, SIR.

WHICH, OF COURSE, WAS PRIOR TO THE DATE OF THIS MURDER.

THE COURT: DOES THE STATE AGREE WITH THAT?

THE SOLICITOR: WELL, IT'S IMMATERIAL BECAUSE I'M [2001] NOT GOING TO ARGUE FUTURE DANGEROUS [sic]. SO THAT TAKES IT OUT OF *SIMMONS* ANYHOW.

MS. FULLWOOD: YOUR HONOR –

THE COURT: YES, MA'AM.

MS. FULLWOOD: –THE STATE HAS ALREADY RAISED FUTURE DANGEROUSNESS. IT RAISED IT IN ITS CASE IN CHIEF BY CALLING CORRECTIONAL OFFICERS TO TESTIFY TO AN ESCAPE ATTEMPT, TO TESTIFY TO THE FACT THAT MY CLIENT HAD POSSESSION OF A SHANK, BY CALLING INMATES WHO TESTIFIED TO HIS BEHAVIOR IN THE JAIL, TO TESTIFY TO HIS PLAN TO TAKE A FEMALE GUARD HOSTAGE. THEY TESTIFIED THAT HE TALKED FREQUENTLY ABOUT ESCAPE.

THE CLEAR INFERENCE THAT THEY SEEK FOR THE JURY TO DERIVE FROM THIS EVIDENCE IS THAT HE HAS A VIOLENT CHARACTER. HE IS GOING TO BE DANGEROUS IN THE FUTURE. THAT IS A PART OF HIS CHARACTER. I BELIEVE THAT IS THE INFERENCE THEY ARE TRYING TO GET THE JURY TO ARRIVE AT. THEY HAVE RAISE [sic] FUTURE DANGEROUSNESS IN THE TYPE OF CASE THEY PUT UP IN AGGRAVATION.

THEY ALSO RAISE THOSE INFERENCES THROUGH THEIR CROSS-EXAMINATION OF OUR

EXPERT WITNESSES AS TO THOSE MATTERS CONTAINED IN THE JAIL RECORDS. FUTURE DANGEROUSNESS HAS ALREADY BEEN PUT AT ISSUE BY THE STATE ITSELF IN ITS CASE IN CHIEF. THAT'S OUR POSITION.

THE SOLICITOR: I CAN'T UNDERSTAND HOW PAST [2002] CONDUCT SOMEHOW THROWS IT OUT INTO THE FUTURE. WE ARE TALKING ABOUT HIS PAST BACKGROUND, CONDUCT, CHARACTER. I AM NOT GOING TO TALK ABOUT THIS DEFENDANT POSING A FUTURE DANGER TO THE PUBLIC AND TO SOCIETY. *STATE VERSUS ROGERS* TALKED A LITTLE BIT ABOUT THAT, BUT I AM NOT GOING TO ARGUE THAT AND THERE HAS BEEN NO EVIDENCE. I DIDN'T PUT UP ANY PSYCHIATRIST OR PSYCHOLOGIST THAT SAID THIS MAN WILL KILL AGAIN IN THE FUTURE.

MS. FULWOOD: WELL, YOUR HONOR, MY POSITION WOULD BE THAT DANGEROUSNESS ISN'T SIMPLY A QUESTION OF WHETHER HE WILL KILL AGAIN IN THE FUTURE. IT'S A QUESTION OF WHETHER HE MIGHT POSE A RISK OF HARM TO ANYONE IN THE FUTURE. THEY HAVE CLEARLY RAISED THE INFERENCE THAT IT HAS. I DON'T THINK THEY HAVE TO USE THE TERM OF ART FUTURE DANGEROUSNESS IN THEIR ARGUMENT TO BRING IT INTO ISSUE. THE IMPLICATION HAS ALREADY BEEN PLACED IN THE RECORD. THEY PLACED IT IN THE RECORD AND I FEEL SURE THAT THE ARGUMENT THAT'S GOING TO BE MADE BY

THE SOLICITOR WILL, AT LEAST, IN PART, INDIRECTLY REMIND THE JURY THAT THE STATE'S POSITION IS THAT HE WILL POSE A TREAT [sic] OF HARM TO OTHER PEOPLE IN THE PRISON POPULATION OR OUTSIDE THE PRISON POPULATION SHOULD HE MANAGE TO ESCAPE IF THEY GIVE HIM A LIFE SENTENCE. IT'S ALREADY AN ISSUE IN THE CASE, JUDGE, SO WE ASK FOR THAT CHARGE.

THE SOLICITOR: IT IS NOT AND *STATE VERSUS* [2003] *ROGERS* DISTINGUISHES BETWEEN ACTS IN PRISON AND ACTS TO THE PUBLIC.

STATE VERSUS BO SULLIVAN, A CASE WE TRIED, YOUR HONOR, TALKS ABOUT THAT. I SAID IT IN THAT CASE, I WASN'T GOING TO ARGUE FUTURE DANGEROUS [sic] TO THE PUBLIC. I DIDN'T AND THE SUPREME COURT UPHELD IT.

THE COURT: ALL RIGHT.

I'VE GOT ONE CASE I NEED TO READ. I'LL RULE ON THAT WHEN I COME BACK ON THE BENCH.

THE SOLICITOR: YOUR HONOR, I THINK *STATE VERSUS IVEY* IS ALSO ANOTHER CASE IN WHICH I THINK EVIDENCE WAS INTRODUCED ABOUT PAST CONVICTIONS OF THE DEFENDANT, PROBATION, PAROLE, THINGS OF THAT NATURE, EARLY RELEASE. THE SUPREME COURT SAID THAT THAT DID NOT INDICATE FUTURE DANGEROUSNESS.

WHAT THEY'RE TALKING ABOUT, PAST INCIDENTS, THAT IN NO WAY IS PROOF OF ANY FUTURE DANGEROUSNESS WHEN IT'S SPECIFICALLY

BROUGHT OUT, WHICH WE HAVE NOT DONE, AND WE WILL NOT ARGUE ANYTHING ABOUT THE FUTURE DANGEROUSNESS TO THE PUBLIC AT WILL, SOCIETY AT WILL.

THE COURT: YES, SIR. I UNDERSTAND WHAT YOU ARE SAYING, SOLICITOR. OF COURSE, YOU KNOW, I THINK THAT THE KEY TO IT IS, OF COURSE, IN THE *SIMMONS* CASE IS WHEN THE STATE PUTS THE DEFENDANT'S FUTURE DANGEROUSNESS AT ISSUE AND THE STATE LAW PROHIBITS THAT PERSON'S RELEASE ON [2004] PAROLE, THEN DUE PROCESS REQUIRES THAT THE DEFENDANT BE ALLOWED TO BRING INELIGIBILITY TO THE JURY'S ATTENTION BY ARGUMENT OR BY COURT INSTRUCTION, OF COURSE. AND *SIMMONS* APPLIES ONLY WHERE BOTH PRONGS OF THE TEST ARE MET.

SO THE QUESTION FOR ME TO DETERMINE IS WHETHER OR NOT YOU HAVE RAISED THE FUTURE DANGEROUSNESS ISSUE. I DON'T KNOW THAT I THINK THAT YOU HAVE.

I'M GOING TO GO BACK AND THINK ABOUT IT FOR A FEW MINUTES AND I'M ALSO GOING TO ALLOW MY CLERK TO MAKE A COPY OF MY CHARGE FOR YOU AND THEN WE'LL GET STARTED. BUT I'LL ADVISE YOU SHORTLY.

———

[2007] **DISCUSSION OF REQUESTS TO CHARGE**

* * *

INSOFAR AS THE REQUESTS FOR CHARGE THAT HAVE BEEN SUBMITTED BY THE STATE AND THE DEFENSE, MS. FULLWOOD AND MR. KIRKLAND, THE ARGUMENT THAT YOU MAKE CONCERNING THE DEFENDANT'S REQUEST TO CHARGE NUMBER ONE, THE STATE – YOU MADE THE ARGUMENT THAT THE STATE HAS MADE FURTHER DANGEROUSNESS AN ISSUE IN THIS MATTER.

I DON'T BELIEVE THAT THE ISSUES THAT HAVE BEEN PRESENTED BY THE STATE INSOFAR AS THE TESTIMONY FROM THE PRISON GUARDS, ET CETERA ARE SUCH THAT CAUSES THIS COURT TO DETERMINE THAT FUTURE DANGEROUSNESS HAS BEEN MADE AN ISSUE. I THINK THOSE ARE ISSUES THAT GO TO THE DEFENDANT'S CHARACTER AND CHARACTERISTICS. AND AS A RESULT, I'M GOING TO DENY DEFENDANT'S REQUEST FOR CHARGE NUMBER ONE.

NOW, IF YOU DESIRE A PLAIN MEANING CHARGE, YOU [2008] KNOW, I'D CERTAINLY CHARGE THAT.

MS. FULLWOOD: WELL, YOUR HONOR, I WANT THE RECORD TO BE CLEAR –

THE COURT: YES, MA'AM.

MS. FULLWOOD: – OF COURSE, AND I THINK IT IS. THAT WE WOULD ASK YOUR HONOR TO CHARGE THE LANGUAGE CONTAINED IN OUR REQUEST TO CHARGE NUMBER ONE.

THE COURT: YES, MA'AM. I HAVE DENIED THAT ONE.

MS. FULLWOOD: I UNDERSTAND THAT. BUT ONLY IN LIGHT OF YOUR RULING ON THAT REQUEST TO CHARGE WOULD I ASK FOR A PLAIN AND ORDINARY MEANING CHARGE AND I WANT – WOULD LIKE TO ASK THE COURT TO CHARGE THE COURT OUT OF *NORRIS* THAT LANGUAGE ONLY. IN OTHER WORDS, THE TERMS –

THE COURT: LIFE MEANS LIFE AND DEATH MEANS DEATH. PERIOD.

MS. FULLWOOD: YES, SIR.

THE COURT: YES, MA'AM.

MS. FULLWOOD: IN ADDITION, YOUR HONOR –

THE COURT: THE ONLY WAY THAT I CHARGE ANYTHING ELSE IS IF THE JURY HAS A QUESTION.

MS. FULLWOOD: IN ADDITION, YOUR HONOR, IN LIGHT OF YOUR RULING ON MY FIRST REQUEST TO CHARGE –

THE COURT: YES MA'AM.

MS. FULLWOOD: – I WOULD ASK YOU TO CONSIDER THIS SUPPLEMENTAL REQUEST TO CHARGE.

[2009] MR. HUMPHRIES: GLAD TO BE HEARD AT ANY TIME, YOUR HONOR.

THE COURT: YES, SIR.

BE GLAD TO HEAR FROM YOU.

MR. HUMPHRIES: PROPOSED CHARGE NUMBER TWO SUBMITTED BY THE DEFENSE IS A CHARGE ON THE FACTS AND AS SUCH, WE WOULD OBJECT TO IT.

THE COURT: HAVE YOU GOT ANY KIND OF A CASE THAT YOU CAN CITE ME TO THAT THIS COMES FROM, MS. FULLWOOD?

MS. FULLWOOD: NO, YOUR HONOR. IT'S SIMILARLY IN LIGHT OF THE FACT THAT THE STATE HAS SAID AND YOUR HONOR HAS RULED THAT THEY HAVEN'T PUT FUTURE DANGEROUSNESS IN ISSUE. FOR THAT REASON, I WANT A CHARGE TO THE JURY THAT, IN FACT, THE STATE HAS IN EFFECT STIPULATED THAT'S NOT AN ISSUE IN THIS CASE. I THINK IT'S NECESSARY IN LIGHT OF THE INFERENCES THAT CAN BE DRAWN FROM THE EVIDENCE THAT THE STATE ITSELF PUT BEFORE THE JURY.

THE COURT: NO, MA'AM. I DISAGREE WITH YOU. I'M GOING TO DENY DEFENDANT'S NUMBER ONE AND TWO AND ASK THAT THE COURT REPORTER MARK THOSE FOR THE RECORD.

(WHEREUPON, COURT'S EXHIBIT NUMBER SEVEN, DEFENDANT'S REQUESTS TO CHARGE, MARKED FOR THE RECORD AT THIS TIME.)

THE COURT: YES, MA'AM.

MS. FULLWOOD: YOUR HONOR?

[2010] THE COURT: YES, MA'AM.

MS. FULLWOOD: IN THAT REGARD, I WOULD ALSO MOVE AND I UNDERSTAND THE RESPONSIBILITY MR. KIRKLAND AND I HAVE DURING THE COURSE OF THE STATE'S CLOSING ARGUMENT, BUT I WOULD MOVE AT THE TIME TO EXCLUDE ANY REFERENCE, DIRECT OR INDIRECT, IN THE STATE'S FINAL ARGUMENT TO THE JURY FOR FUTURE DANGEROUSNESS.

THE COURT: WELL, I THINK THAT THAT HAS BEEN TAKEN CARE OF AND THE SOLICITOR HAS INFORMED THE COURT THAT HE DOESN'T INTEND TO ARGUE FUTURE DANGEROUS [sic].

IS THAT CORRECT, SOLICITOR?

THE SOLICITOR: THAT'S CORRECT, YOUR HONOR.

THE COURT: ALL RIGHT.

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[2011] MS. FULLWOOD: A FEW MATTERS, YOUR HONOR.

THE COURT: YES, MA'AM.

MS. FULLWOOD: FIRST OF ALL AND, JUDGE, I PROMISE I'M NOT TRYING TO BEAT A DEAD HORSE.

THE COURT: I UNDERSTAND.

MS. FULLWOOD: BUT I WANT AT THIS STAGE FOR THE [2012] RECORD TO BE CLEAR FOR

THE GROUNDS FOR MY REQUEST FOR MY FIRST REQUEST TO CHARGE –

THE COURT: YES, MA'AM.

MS. FULLWOOD: – IF I MAY, SIR?

IT'S BASED ON HIS DUE PROCESS RIGHT TO REBUT ANY FACT OR CONSIDERATION THAT WOULD TEND TO SUPPORT A SENTENCE OF DEATH AND WE BELIEVE THAT THROUGH THE EVIDENCE, THE STATE HAS PLACED IN THE RECORD IN ITS CASE IN CHIEF AND THROUGH THE MANNER IN WHICH IT HAS CROSS-EXAMINED OUR WITNESSES, THAT EVIDENCE IS NOW IN THE RECORD TO SUPPORT INFERENCES THAT HE MAY ESCAPE AND MAY BE A DANGER IN THE PRISON. ESPECIALLY OF BEING A DANGER TO – OF ESCAPE AND HURTING PEOPLE OUTSIDE THE PRISON WALLS. THE FACT THAT HE'S GOING TO BE IN PRISON FOR THE REST OF HIS LIFE, NEVER GOING ANYWHERE, WE CAN'T REBUT IT WITHOUT THAT CHARGE. *GARNER V. FLORIDA, SKIPPER V. SOUTH CAROLINA, SIMMONS*, ALL REQUIRE – THOSE LINE OF CASES REQUIRE THAT CHARGE IN THIS CASE.

IT ALSO – IT'S PRECLUDING US FROM PUTTING BEFORE THE JURY THE BASIS FOR A SENTENCE OF LESS THAN DEATH. IN OTHER WORDS, THE *LARKIN* (PHONETICALLY) PRINCIPLE.

FURTHERMORE, BY ALLOWING THAT TYPE OF EVIDENCE IN THE RECORD WITHOUT LETTING US EXPLAIN IT OR LETTING US GIVE THE JURY CORRECT INFORMATION AS TO THE TYPE OF SENTENCE

HE WILL ACTUALLY RECEIVE, IF HE RECEIVES A SENTENCE OF LIFE [2013] IMPRISONMENT, IT'S ALLOWING THE JURY OR IS ALLOWING THE STATE TO PROJECT INTO THESE PROCEEDINGS ARBITRARY AND CAPRICIOUS FACTORS THAT MIGHT LEAD TO IMPOSITION OF THE DEATH PENALTY AND, OF COURSE, OUR STATE CONSTITUTION HAS CORRESPONDING PROVISIONS THAT DEMAND THAT THESE PRINCIPLES CF LAW BE FOLLOWED.

THE COURT: DOES THE STATE WANT TO ADDRESS THAT AT ALL?

MR. HUMPHRIES: NO, SIR.

THE COURT: ALL RIGHT.

I UNDERSTAND YOUR MOTION. I THINK THAT THE RECORD IS CLEAR. IT'S DENIED.

[2024] **CLOSING ARGUMENTS BY THE SOLICITOR**

* * *

AWAY FROM. WE ARE ALL HUMAN BEINGS. REGARDLESS OF HOW WELL TRAINED THE PRACTITIONERS ARE, WE ARE DEALING WITH HUMAN BEINGS THAT ARE HERE IN COURT AND HAVE BEEN BROUGHT HERE BECAUSE OF CIRCUMSTANCES THAT HAVE EXISTED OVER WHICH NONE OF US HAVE ANY CONTROL.

AND HAVING SAID THAT, THE MOTION IS DENIED.

MR. KIRKLAND: THANK YOU.

LET'S BRING THEM BACK, PLEASE.

(JURY IN.)

THE COURT: THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

ALL RIGHT, SOLICITOR.

THE SOLICITOR: MR. FOREMAN AND LADIES AND GENTLEMEN OF THE JURY, AT THIS POINT, YOU HAVE HEARD ALL OF THE TESTIMONY THAT YOU ARE GOING TO HEAR IN *THE STATE VERSUS WILLIAM ARTHUR KELLY*.

AND RIGHT UP FRONT, I'M GOING TO JOIN EVERYONE IN THIS COURTROOM, THE JUDGE, THE DEFENSE ATTORNEYS, EVERYONE ASSOCIATED WITH THIS CASE IN THANKING YOU. THIS CASE HASN'T LASTED THAT LONG. IT'S BEEN A RELATIVELY QUICK CASE, BUT THE WITNESSES THAT HAVE BEEN PRESENTED, YOU HAVE GIVEN THEM YOUR UNDIVIDED ATTENTION AS YOU SHOULD HAVE AND WE APPRECIATE IT. THERE ARE OVER 120 ODD PIECES OF EVIDENCE. IT'S A LARGE VOLUME. I KNOW YOU HAVE GIVEN THAT YOUR UNDIVIDED ATTENTION, CONSIDERATION AND YOU CONTINUE TO [2025] DO SO. AND WE'RE AT THAT POINT WHERE I TOLD YOU LAST NIGHT THERE'S ONE MORE THING WE HAVE TO DO. THERE'S ONE MORE DECISION WE HAVE TO MAKE. THERE'S ONE MORE DUTY TO PERFORM.

THE JUDGES AROUND THE STATE, INCLUDING JUDGE CLARY, FREQUENTLY TELLS JURORS THAT

YOU KNOW – AND I THINK WINSTON CHURCHILL SAID THIS, IN PEACETIME, THE MOST IMPORTANT SERVICE YOU CAN RENDER IS SERVING ON A JURY. AND YOU HAVE FULFILLED THAT OBLIGATION, THAT DUTY, IN A MOST EXEMPLARY MANNER. AND CARRYING OUT THAT DUTY AND REACHING THAT ONE FINAL DECISION, I KNOW IT'S DIFFICULT. I KNOW THIS IS NOT AN EASY THING. I KNOW THIS IS AN EMOTIONAL POINT AND IT SHOULD BE BECAUSE WE ARE ASKING FOR THE ULTIMATE AND IT IS WARRANTED, FOLKS. IT IS THE PUNISHMENT THAT FITS THE CRIME.

AND YOU KNOW YOU WERE ASKED, ALL OF YOU, AS YOU SAT IN THAT CHAIR, NOW, YOU DON'T KNOW WHAT THE OTHER JURORS WERE ASKED, BUT EVERY ONE OF YOU WERE ASKED, IN THE APPROPRIATE CIRCUMSTANCES, IF THE PUNISHMENT FITS THE CRIME, COULD YOU VOTE FOR THE DEATH PENALTY AND EVERY ONE OF YOU SAID YES. AND IS THIS NOT THE CASE? IS THIS NOT THE CRIME FOR IT TO FIT? IT'S UP TO YOU TO DECIDE. THAT'S YOUR DECISION.

I TOLD YOU IT WASN'T GOING TO BE PRETTY. EVEN TELLING YOU THAT, I KNOW YOU COULDN'T ANTICIPATE THE [2026] PAIN, THE ABUSE, THE TORTURE ONE HUMAN BEING COULD INFLICT ON ANOTHER. THAT MURDERER COULD INFLICT ON A PERSON WHO WAS HIS MOTHER'S FRIEND. BUT HE DID IT.

YOU WERE ALSO ASKED ABOUT AGGRAVATING CIRCUMSTANCES AND MITIGATING CIRCUMSTANCES AND THAT'S STRANGE TERMS PARTICULARLY IN THE LEGAL SENSE.

NOW, JUDGE CLARY IS GOING TO TELL YOU IN MORE DETAIL ABOUT THAT. HE WILL TELL YOU ABOUT AN AGGRAVATING CIRCUMSTANCE, MAKING A CRIME WORSE. CAN THIS BE MADE ANY WORSE? CAN THIS BE ANYMORE HORRIBLE THAN WHAT IT IS? THAT'S FOR YOU TO DECIDE. AND HE WILL TELL YOU ABOUT THE MITIGATING CIRCUMSTANCES, TO LESSEN THE SEVERITY OR CULPABILITY OF THE CRIME. IS THERE ANYTHING, ANYTHING THAT CAN LESSEN THIS?

I TOLD YOU LAST NIGHT THAT WE WERE RELYING ON FIVE AGGRAVATING CIRCUMSTANCES. YOU WILL HAVE THESE IN WRITING IN THE JURY ROOM. JUDGE CLARY IS GOING TO GIVE THEM TO YOU.

I ALSO TOLD YOU WE ONLY HAD TO PROVE ONE FOR YOU TO IMPOSE THE DEATH PENALTY, BUT HAVEN'T WE PROVED ALL FIVE TO YOU, FOLKS. THERE'S NO DOUBT. WE ONLY HAVE TO PROVE IT TO A REASONABLE DOUBT, BUT THERE IS NO DOUBT. THAT AT THE K.F.C. ON JANUARY THE 5TH, 1996, THAT FRIDAY NIGHT, WHEN THAT MURDERER WAS CARRYING OUT HIS PLAN, PUTTING IT INTO FRUITION, SURROUNDING THAT TIME AND PLACE AND MURDER, THESE [2027] ACTS, THESE CRIMES WERE ALSO COMMITTED.

KIDNAPPING. YOU HAVE ALREADY FOUND THAT TO BE TRUE. HE WAS IN THE BACK OF THIS

CAR, FOLKS. HE WAS IN THAT BACK-SEAT THERE. NOT ONLY THAT, INSIDE THAT STORE, HE CONFINED HER. HE RESTRAINED HER. HE TOOK HER FREEDOM AWAY WHEN HE TAPED HER HANDS AND TAPED HER TO THAT CHAIR. THERE'S NO DOUBT ABOUT KIDNAPPING.

BURGLARY, GOING INTO A BUILDING WITHOUT LAWFUL AUTHORITY, WITHOUT CONSENT. WELL, SHIRLEY MIGHT HAVE LET HIM IN, BUT IT WASN'T VOLUNTARILY OR WILLINGLY BECAUSE HE EITHER HAD THIS KNIFE AT HER NECK OR MAYBE AT HER STOMACH. THAT'S ENTERING WITHOUT CONSENT WITH A DEADLY WEAPON, A KNIFE. HE USED IT TO INFLICT PHYSICAL PAIN. HE DISPLAYED IT. IT WAS DURING THE NIGHTTIME. THERE'S NO DOUBT IT'S A BURGLARY. THE STORE HAD ALREADY CLOSED. IT WAS NO LONGER OPEN TO THE PUBLIC AND HIM.

NUMBER THREE, ROBBERY WHILE ARMED WITH A DEADLY WEAPON. YOU HAVE ALREADY FOUND THAT. ROBBERY. A DEADLY WEAPON. YOU HAVE ALREADY FOUND THAT.

LARCENY WITH THE USE OF A DEADLY WEAPON SIMILAR TO ARMED ROBBERY. STEALING THINGS, CARRYING AWAY WITH THE USE OF A DEADLY WEAPON.

AND LASTLY, AND I TOLD YOU PROBABLY THE MOST IMPORTANT ONE, CERTAINLY THE MOST GRUESOME, PHYSICAL TORTURE. DID HE NOT TORTURE SHIRLEY SHEALY?

[2028] YOU HEARD THAT FELLOW LAST NIGHT, WITH ALL OF THOSE DIAGRAMS ON THAT SCREEN SHOWING YOU THE BLOOD AND ALL THE CONVERGENCE POINTS AND THE STREAKING AND THE SPATTERING.

PHYSICAL TORTURE THE JUDGE IS GOING TO TELL YOU IS THE PHYSICAL ABUSE OF ANOTHER PERSON. AGGRAVATED BATTERY. YOU DON'T THINK THAT WAS AGGRAVATED? YOU DON'T THINK THAT WAS BATTERY? IT WASN'T SIMULTANEOUS DEATH. THE DOCTOR TOLD YOU THAT. IT WAS PROLONGED, INTENTIONAL, UNMERCIFUL, INTENTIONAL INFLICTION OF SEVERE PAIN AND ABUSE TO ANOTHER PERSON. DON'T YOU KNOW THAT SHIRLEY WAS FIGHTING FOR HER LIFE IN THERE.

FROM THE FIRST MOMENT IN THAT OFFICE ON DON'T YOU KNOW SHE WAS FIGHTING. BUT HE WOULDN'T TAKE NO FOR AN ANSWER. HE WAS CARRYING OUT HIS PLAN. HE HAD IT MAPPED OUT BETTER THAN BRAD SCOTT EVER PUT TOGETHER A FOOTBALL PLAN. AND HE CERTAINLY CARRIED IT OUT BETTER THAN THE GAMECOCKS CAN. HE WAS A MASTER MURDERER. AND NOT INSTANTANEOUS, BUT PROLONGED, UNMERCIFUL, SEVERE PAIN AND ABUSE. ALL WE'VE GOT TO DO IS PROVE ONE.

THE JUDGE IS GOING TO TELL YOU, FOLKS, IF YOU FIND ONE OR MORE; YOU CAN FINE [sic] ONE, TWO, THREE, FOUR, FIVE, ANY COMBINATION OF THEM, YOU MAY CONSIDER IMPOSING THE DEATH PENALTY. ———

FIVE STATUTORY AGGRAVATING CIRCUMSTANCES IN THIS [2029] CASE. FIVE.

HE'S GOING TO TELL YOU ABOUT MITIGATING CIRCUMSTANCES. THESE ARE THINGS IN FAVOR OF THE DEFENDANT. AND YOU WILL HAVE THIS IN YOUR JURY ROOM IN WRITING.

THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTION INVOLVING THE USE OF VIOLENCE AGAINST ANOTHER PERSON. YOU GIVE THAT WHAT WEIGHT YOU THINK IT SHOULD.

THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME BECAUSE HE WAS BELOW THE AGE OF EIGHTEEN AT THE TIME OF THE CRIME.

THAT'S THINGS IN HIS FAVOR.

NO PRIOR CONVICTIONS OF VIOLENCE AGAINST ANOTHER PERSON; BELOW THE AGE OF EIGHTEEN. YOU KNOW SOMETHING, A PERSON THAT COMMITS AN UNCHARACTERISTIC AND AN UNPREDICTABLE CRIME IS MORE FRIGHTENING THAN A SERIAL KILLER, MORE FRIGHTENING THAN A CAREER CRIMINAL. IS THAT PERSON UN-CHARACTERISTICALL [sic], BECAUSE HE HADN'T DONE IT BEFORE? YOU KIND OF TRUST THEM A LITTLE BIT.

UNPREDICTABLY BECAUSE OF HIS AGE. YOU DON'T THINK THEY WILL DO ANYTHING. THOSE PEOPLE ARE SUPPOSED TO BE KIND, SUPPOSED TO BE YOUR FRIEND, SUPPOSED TO BE NICE; SUPPOSED TO BE KIND. WELL, THAT'S THE KIND THAT WHILE THEY ARE HUGGING YOU WITH KINDNESS, THEY'RE

GETTING READY TO KILL YOU WITH KINDNESS. DOES THAT GO IN HIS FAVOR –

[2030] MR. KIRKLAND: OBJECTION, YOUR HONOR –

THE COURT: YES, SIR.

MR. KIRKLAND: – INFLAMMATORY.

THE COURT: OVERRULED.

THE SOLICITOR: DOES THAT GO IN HIS FAVOR?

YOU REMEMBER HE HAD THAT SHANK BEHIND HIS BACK WHEN THAT LADY, THE ONE MOST VULNERABLE DOWN AT THE LEXINGTON COUNTY JAIL, WHICH BY THE WAY IS WORSE THAN THE PRISONS THEY SAY – THAT FELLOW SAID TODAY. KILL THEM WITH KINDNESS.

OH, HE DOESN'T HAVE A PRIOR RECORD. THE LAW DOESN'T SAY YOU HAVE TO KILL, KILL, STEAL, STEAL AND ROB BEFORE THE DEATH PENALTY IS INVOLVED. ISN'T THIS BAD ENOUGH ON ITS OWN?

HE WAS GOING TO KILL. IT WAS JUST A MATTER OF WHEN. WHETHER IT WAS 17, 27, OR 37. BUT IF YOU WANT TO GIVE HIM SOME BENEFIT OF THE DOUBT, IF YOU WANT TO GIVE HIM LENIENCY, THEN YOU WRITE OUT LIFE. IF THAT'S WHAT THIS CRIME CALLS FOR. IT'S UP TO YOU.

AND THE JUDGE IS GOING TO SAY EVEN IF YOU DON'T FIND ANY OF THESE MITIGATING CIRCUMSTANCES AND YOU FIND ALL OF THOSE AGGRAVATING CIRCUMSTANCES, YOU CAN IMPOSE A LIFE SENTENCE FOR ANY REASON OR NO REASON.

FOLKS, IF YOU WANT TO RETURN A LIFE SENTENCE IN THIS CASE, IT WOULD BE FOR NO REASON AT ALL. WE'RE JUST [2031] WASTING OUR TIME. WE SHOULD HAVE DONE IT WHEN WE STARTED OFF MONDAY IF THAT'S THE APPROPRIATE SENTENCE. IT'S UP TO YOU. I KNOW IT'S NOT AN EASY DECISION. I KNOW IT'S DIFFICULT.

I'M GOING TO BE THE LAST PERSON THAT SPEAKS TO YOU ON BEHALF OF THE STATE, ON BEHALF OF THE VICTIM BECAUSE THEY SPEAK LAST. THE DEFENDANT IS EVEN GOING TO HAVE A CHANCE TO SPEAK TO YOU. HE'S GOING TO TALK TO YOU.

MERCY. YOU ARE GOING TO HEAR SOME CRIES FOR MERCY.

WHEN THEY ARE UP THERE TALKING, YOU THINK TO YOURSELF, WHERE WAS THAT MERCY AT THE K.F.C. ON FRIDAY, JANUARY THE 5TH, 1996? WHERE WAS THAT MERCY WHEN HE WAS TYING SHIRLEY SLADE SHEALY'S HANDS BEHIND HER BACK? WHERE WAS THAT MERCY WHEN HE WAS TYING HER LEG TO THE CHAIR? WHERE WAS THAT MERCY WHEN SHE WAS FIGHTING HIM OFF? WHERE WAS THE MERCY WITH THESE STABS WOUNDS? DON'T THINK ABOUT THEN. DON'T THINK ABOUT THEN. THINK ABOUT NOW. LET'S GIVE HIM MERCY.

IF THAT'S APPROPRIATE, IF THAT'S JUSTIFIED, WRITE IT OUT IN BIG BOLD LETTERS, LIFE FOR THIS CRIME.

YOU KNOW, I TOLD YOU LAST NIGHT AT 6 O'CLOCK WHEN WE STARTED OFF, HE ALREADY HAD HIS THINGS, HE ALREADY HAD HIS PLAN LINED UP. YOU HEARD THESE CAME FROM MCDONALD'S WHERE HE WORKED OR A SIMILAR KIND. IT WASN'T IN THE [2032] KENTUCKY FRIED CHICKEN, THE TAPE. THE KNIFE, IT WASN'T IN THE KENTUCKY FRIED CHICKEN. HE BROUGHT THOSE THINGS.

AND, YOU KNOW, WHEN THEY'RE TALKING ABOUT AGE, THINK ABOUT THESE OBJECTS IN HIS HANDS. AND WHEN YOU TALK ABOUT AGE AND YOU'RE TALKING ABOUT PHYSICAL TORTURE, THINK OF THE DIFFERENT SIZES. THE JUDGE WILL TELL YOU ABOUT THAT, OF THE TWO, THE DIFFERENT SEX, AND THINK OF THE DIFFERENT CONDITIONS. WHY IN THE WORLD WOULD HE PLAN TO MURDER AND NOT ONLY HIS MOTHER'S BEST FRIEND, NOT ONLY SUPPOSEDLY HIS FRIEND, BUT A PREGNANT WOMAN –

MS. FULLWOOD: OBJECTION, YOUR HONOR.

THE COURT: I NOTE YOUR OBJECTION. IT'S OVERRULED.

THE SOLICITOR: WHY WOULD HE WANT TO MURDER A PREGNANT WOMAN? DID IT MAKE ANY DIFFERENCE THAT SHE WAS 25 AND HE WAS

17? SHE'S NO LESS DEAD. SHE'S NO LESS SIX FEET DOWN. THE ONLY THING THEY SAY IS WORSE THAN THAT IS KILLING A CHILD. WELL, DIDN'T HE DO THAT, TOO.

MS. FULLWOOD: OBJECTION, YOUR HONOR. THAT'S NOT THE LAW.

THE COURT: SUSTAIN THE OBJECTION :

THE SOLICITOR: DID SHIRLEY –

THE COURT: – PLEASE DISREGARD THAT, LADIES AND GENTLEMEN.

THE SOLICITOR: DID SHIRLEY HAVE THAT BABY? DID [2033] THAT BABY PERISH WITH HER? THAT'S FOR YOU TO DECIDE. BUT IF YOU THINK THAT'S IN HIS FAVOR, YOU GIVE IT THE WEIGHT, FOLKS, THAT YOU THINK IT DESERVES.

YOU KNOW WHEN SHIRLEY LEFT THAT NIGHT AND MS. ADAMS SAW HER LEAVING, I TOLD YOU BEFORE SHE HAD NO IDEA HOW HORRIBLE THE LAST TWENTY MINUTES OF HER LIFE WOULD BE. CAN YOU IMAGINE WITH HER IN THAT CAR AND IT [sic] DARK AND SHE'S RIDING AND GOING HOME AND A KNIFE COMES TO HER THROAT IN THE BACK OF THE CAR. YOU HEAR WHAT HE SAID. I CAN'T GET IN MY CAR ANYMORE. I'M LOOKING AROUND. I DON'T TRUST PEOPLE ANYMORE. AND GOING INTO THAT STORE, GOING INTO THE K.F.C., WHERE ALL WAS THAT KNIFE POINTED ON HER? WHO ALL WAS SHE THINKING ABOUT? WHAT WERE HER CONCERNS WHEN THAT TAPE RIPPED OFF OF THAT ROLL AND SHE HEARD IT TIGHTENING AROUND

HER HANDS. AND LOOK AT HER HANDS HOW WHITE THEY ARE. YOU CAN LOOK AT SOME OF THOSE AUTOPSY PICTURES AND YOU CAN STILL SEE THE LIGATURE MARKS FROM WHERE THAT TAPE WAS TIED AROUND HER.

WHAT ARE THE PAINS SHE FELT, WHAT ARE THE STINGING SENSATIONS WHEN THIS KNIFE RIPPED THROUGH HER THROAT? IT'S ON THE OTHER SIDE OF THIS EXHIBIT. WONDER HOW IT FELT WHEN IT CUT HER VOCAL CORDS AND SHE NO LONGER COULD SCREAM. SHE NO LONGER COULD TALK. SOMEWHERE IN THERE, SHE THREW UP. SHE WAS BREATHING THROUGH HER THROAT. YOU RECKON HER MOUTH WAS MOVING. YOU RECKON SHE WAS TRYING [2034] TO YELL FOR HELP. AS HER HANDS WERE BEHIND HER BACK AND HER THROAT IS CUT, DO YOU RECKON THAT SHE'S SAYING, OH, GOD, HELP ME, SOMEBODY, BUT SHE COULDN'T.

MERCY. IS THAT MERCY? WAS THAT MERCY?

WHY WOULD HE HACK HER IN THE BACK OF THE HEAD? AND WHEN SHE CAN'T SCREAM, THE ONLY THING SHE COULD DO WAS THROW UP. YOU REMEMBER THE DOCTOR, THE ONLY THING SHE COULD DO WAS THROW UP. BECAUSE IT WAS UP TOP, NOT IN THE BOTTOM. YOU RECKON SHE WAS THROWING UP AND TRYING TO YELL, TRYING TO PLEAD FOR MERCY. WOULD HE LISTEN? BUT HE WANTS YOU TO LISTEN NOW.

WHERE WAS THE MERCY WHEN THAT SAME NIGHT, AFTER CUTTING HER THROAT TWICE, DUG INTO THE SIDE OF HER NECK. YOU CAN SEE THE

FATTY TISSUE RIGHT THERE THE STINGING SENSATION, THE PAIN, THE TORTURE. WONDER WHAT SHE WAS THINKING ABOUT, FOLKS? YOU RECKON SHE HAD SIDNEY BRUCE ON HER MIND? WHAT WAS GOING THROUGH THAT YOUNG WOMAN'S MIND?

WHY WOULD HE WANT TO STAB HER UNDER HER BREASTS, THE TOP OF HER BREASTS, DOWN THE SIDE? IS THAT MERCY? IS THAT FOR A LIFE SENTENCE? HOW COULD YOU DO THIS TO ANOTHER HUMAN BEING? HOW COULD YOU INFLICT THAT TO A ANOTHER HUMAN BEING, MORE LESS SOMEBODY YOU KNOW, MORE LESS SOMEBODY WHOSE GOT A CHILD THAT'S FIVE OR SIX-YEARS OLD –

MS. FULLWOOD: OBJECTION, YOUR HONOR –

THE SOLICITOR: – AND IS PREGNANT.

[2035] THE COURT: NOTE YOUR OBJECTION.

THE SOLICITOR: A FIVE OR SIX-YEAR-OLD CHILD AT HOME AND HE KNOWS THAT SHE'S PREGNANT AND HE KNOWS HER, HOW CAN YOU DO THAT TO ANOTHER HUMAN BEING? AND IF YOU WANT TO GIVE HIM MERCY, IF THEY SAY IT, PLEASE GIVE HIM MERCY FOR THAT. HOW CAN YOU DO THAT? HE DID IT. AND YOU KNOW SOMETHING. ONE OF THE MOST, PROBABLY HUMILIATING MOST OF ALL – AND YOU'VE GOT THESE PANTS, YOU'VE GOT THESE SHIRTS. YOU SEE ALL OF THESE STAB WOUNDS. HE EVEN CUT HER BRA UNDER HER AND RIGHT UNDER THESE PANTS BACK HERE, YOU SEE THAT. YOU SEE THAT. SHE HAD TO BE STABBED

WHEN SHE WAS LYING DOWN BECAUSE THAT WENT STRAIGHT IN UNLESS HE DID THAT. AND THEN THE ONE RIGHT HERE. HE WOULD HAVE TO COME UP FROM THE FLOOR TO STAB HER UNLESS HE STABBED HER WHILE SHE WAS DOWN. STABBING HER WHILE YOU'RE DOWN. KICK HER WHILE YOU'RE DOWN. KEEP ON PLUNGING, KEEP ON SLICING, HACKING, BLOODY BILLY, THE BUTCHER OF BATESBURG –

MR. KIRKLAND: OBJECTION TO THE INFLAMMATORY NATURE, YOUR HONOR –

THE COURT: JUST A –

MR. KIRKLAND: OBJECTION TO THE INFLAMMATORY NATURE OF THAT ARGUMENT.

THE COURT: OVERRULED.

THE SOLICITOR: BLOODY BILLY AND THE BUTCHER OF BATESBURG AND HE WANTS MERCY –

[2036] MR. KIRKLAND: OBJECTION TO THE REFERENCE OF –

THE COURT: JUST ONE MOMENT, SOLICITOR.

MR. KIRKLAND: OBJECTION TO THE REFERRAL AS BLOODY BILLY.

THE COURT: I'LL SUSTAIN THE OBJECTION AND ASK THAT THE JURY DISREGARD THAT STATEMENT. THAT IT BE STRICKEN FROM THE RECORD.

THE SOLICITOR: THEY CALL HIM BILLY. LET ME SHOW YOU SOMETHING, FOLKS. WHAT DO YOU

SEE IN THESE PICTURES? DOES THAT CONNECT THE TWO? BUT THEY WANT YOU TO THINK OF HIM AS LITTLE BILLY. LITTLE BILLY, THE KID. I KNOW ANOTHER BILLY, THE KID, THAT HE REMINDS ME OF. HE'S NOT A KID, HE'S A KILLER. AND HE COMMITTED A MAN-SIZED CRIME AND HE NEEDS A MAN-SIZED PUNISHMENT. THAT'S WHAT WE ARE DEALING WITH. AND HE BUTCHERED HER. THERE'S NO DOUBT ABOUT IT. AND HE'S FROM BATESBURG. SO IF YOU WANT TO PUT THOSE TWO TOGETHER, YOU SAY IT IF I CAN'T, THE BUTCHER OF BATESBURG.

MR. KIRKLAND: OBJECTION, AGAIN, YOUR HONOR.

THE SOLICITOR [sic]: SUSTAIN THE OBJECTION.

THE SOLICITOR: THAT'S WHAT HE IS.

THE COURT: LADIES AND GENTLEMEN OF THE JURY, PLEASE DISREGARD THE SOLICITOR'S COMMENT. IT IS STRICKEN FROM THE RECORD.

THE SOLICITOR: AND HE DID IT WITH HIS FAVORITE [2037] TOOL. THIS IS WHAT HE LOVES. THIS IS WHAT HE WANTS. THIS IS HIS PARTNER. THIS IS HIS FRIEND. TO GET WHAT HE REALLY WANTS. YOU KNOW, HE ONLY ENDED UP WITH LESS THAN ABOUT 150 DOLLARS. THIS IS MONEY THAT WAS FOUND. YOU REMEMBER SHE HAD 102 DOLLARS STILL STUCK TO HER BODY WHEN SHE WAS AT THAT AUTOPSY IN NEWBERRY. OVER A THOUSAND LEFT ON THE FLOOR BECAUSE THAT POLICE OFFICER HAPPENED BY.

MERCY? MITIGATION? IF YOU FIND IT, FOLKS, SPEAK IT OUT FOR WHAT HE'S DONE. AND, YOU KNOW WHAT, WHAT DID HIS OWN WITNESS SAY. HE DOESN'T HAVE ANY MENTAL ILLNESS. HE'S INTELLIGENT. HE'S NOT RETARDED. HE'S QUICK-WITTED. DOESN'T THAT MAKE SOMEBODY A LITTLE MORE DANGEROUS –

MS. FULLWOOD: OBJECTION, YOUR HONOR.

THE COURT: JUST A MOMENT. YES, MA'AM. STATE YOUR GROUNDS.

MS. FULLWOOD: THE SOLICITOR HAS STIPULATED DANGEROUSNESS IS NOT AN ISSUE –

THE SOLICITOR: – FOR THIS LADY, THIS CRIME ON JANUARY THE 5TH, DOESN'T THAT MAKE HIM MORE UNPREDICTABLE FOR SHIRLEY SHEALY. WHEN YOU LET YOUR GUARD DOWN AND THEY STAB YOU IN THE BACK. THAT'S WHAT WE HAVE HERE. THAT'S WHAT WE DO KNOW. THAT'S WHAT HE DID. HE MADE HIS OWN MOTHER ADMIT THAT. HE MADE HIS OWN FAMILY VICTIMS.

YOU KNOW IT KIND OF SOUNDS FROM THE EVIDENCE THAT WHAT WE DID AT KENTUCKY FRIED CHICKEN WITH SHIRLEY IS KIND [2038] OF LIKE TOYING WITH HER, IT'S KIND OF LIKE GOING FROM ONE PLACE TO ANOTHER. IT'S KIND OF BATTING IT BACK AND FORTH. DOES THAT SHOW YOU GOOD CHARACTER? AND WE ARE TALKING ABOUT CHARACTER AND FITNESS. AND IF YOU SHOULD SEE ANYTHING IN HIS BACKGROUND FAVORABLE TO

HIM, GIVE HIM THE BENEFIT OF THE DOUBT. AND THEY SAY, OH, OH, IF Y'ALL SEND HIM TO PRISON, IT'S GOING TO BE HORRIBLE ON HIM. THEY'VE GOT BAD PEOPLE IN PRISON. THEY'VE GOT ALL KIND OF KILLERS OVER THERE. WELL, WHAT IS HE? IT'S GOING TO BE ROUGH ON HIM. BUT AT THE SAME TIME, THEY PUT UP TWO PEOPLE WHO SAID, YOU KNOW, WHAT, HE'S GOING TO ADAPT TO PRISON. WELL, WHICH IS IT? IS HE GOING TO LIKE IT OR IS IT GOING TO BE BAD? THEY SAID HE'LL ADAPT TO IT. SO IT SOUNDS LIKE HE'S GOING TO LIKE IT. YOU KNOW, HE EVEN TOLD SOMEBODY BROUGHT OUT TODAY, I'M LOOKING FORWARD TO GOING TO PRISON. I'M THERE TO MAKE MY NEW HOUSE, TO MAKE MY NEW ROOM. AND, YOU KNOW, WHAT THAT DOCTOR SAID, THE ONE THING I WAS IMPRESSED ABOUT HIM IS HE'S QUICK-WITTED. HE'S ABLE TO TALK HIMSELF OUT OF SITUATIONS AND THAT'S THE BEST PROTECTION YOU CAN HAVE IN PRISON. AND HE LEARNED FROM THE MASTER, HIS MENTOR, THAT GUY IN THE ORANGE SUIT THAT TESTIFIED LAST NIGHT. HE'S ALREADY A CON. BUT HE WANTS Y'ALL TO GIVE HIM LIFE FOR THAT.

A MONTH BEFORE HE'S COMING IN HERE TO FACE THE DEATH PENALTY, THERE'S A BLOCK OVER THERE THAT'S BEING [2039] EDGED OUT. THREE PEOPLE IN THE CELL. HE DIDN'T SAY, HEY, GUARDS, COME DOWN HERE, YOU BETTER GET THESE TWO FELLOWS BECAUSE THEY ARE GOING TO ESCAPE, THEY ARE TRYING TO BREAK OUT. I'M GOING ON TRIAL. NOW, LET ME TELL YOU, DID HE SAY THAT? OH, NO, HE DOESN'T HAVE ANYTHING TO DO WITH

IT AND THAT TOOTHBRUSH HE HAD WITH THE METAL TIP IN IT, OH, THAT'S JUST BEING A BIG MAN, TO CLEAN HIS FINGERNAILS. THAT'S NOT TO HURT ANYBODY, NOT MS. MARSHA PRICE, THE LADY EVERYBODY SAYS –

MR. KIRKLAND: OBJECTION, YOUR HONOR. HE'S – I THINK HE'S GOING AFIELD TO WHAT WE STIPULATED TO ON THE FUTURE PROBLEMS.

THE SOLICITOR: I AM TALKING ABOUT –

THE COURT: SOLICITOR, IF YOU WOULD, PLEASE LIMIT YOUR ARGUMENT TO WHAT WE DISCUSSED, SIR.

THE SOLICITOR: I AM TALKING ABOUT WHAT HAPPENED FROM THE WITNESSES WHO TESTIFIED ON THIS STAND. AND DIDN'T YOU HEAR A WOMAN NAMED MARSHA PRICE WHO WORKED AT THE LEXINGTON COUNTY JAIL. DIDN'T THEY SAY THAT SHE WAS THE ONE MOST GULLIBLE, THE ONE YOU COULD TAKE HOSTAGE? DIDN'T YOU HEAR HE HAD THAT SHANK BEHIND HIS BACK CALLING HER TO THE DOOR –

MS. FULLWOOD: OBJECTION, YOUR HONOR –

THE SOLICITOR: – IF YOU DIDN'T HEAR THAT, DISREGARD IT –

[2040] MS. FULLWOOD: – THIS IS GOING OUTSIDE THE SCOPE OF THE SITUATION –

THE COURT: OVERRULED –

MS. FULLWOOD: – STIPULATION –

THE COURT: OVERRULED.

THE SOLICITOR: IF YOU DIDN'T HEAR SOMEBODY TESTIFY TO THAT, FOLKS, YOU HOLD IT AGAINST ME AND NOT AGAINST THIS FAMILY OUT HERE, PLEASE. BUT I SWEAR I HEARD THAT FROM THE STAND. BUT YOU TAKE IT AS YOU HEARD IT. THAT'S JUST SHANKS WILL BE SHANKS. AND MURDERERS WILL BE MURDERERS. AND HE IS THE COLD-BLOODED ONE RIGHT OVER THERE.

WHAT DO THESE FOLKS HAVE TO TELL YOU OUT HERE? YOU RECKON MS. SHEALY STANDING UP AT THAT ALTAR ON HER WEDDING DAY, SHE WOULD REALIZE THAT WITHIN A FEW YEARS SHE WOULD BE BACK AT THAT CHURCH AGAIN IN A CASKET, AN UNBORN BABY IN HER ARMS.

MR. KIRKLAND: OBJECTION.

THE COURT: OVERRULED.

THE SOLICITOR: DIDN'T YOU HEAR THEM SAY THAT? DIDN'T YOU HEAR THE TESTIMONY? A HAPPY DAY. FAMILY MEMBERS, WEDDING DAY. RETURN TO THE SAME CHURCH ON JANUARY THE 8TH OF 1996, FOR THE LAST TIME. AT WHOSE HANDS? AT WHOSE BLOODY MURDERING HANDS? WELL, THEY WEREN'T BLOODY BECAUSE HE HAD HIS GLOVES ON. BUT HE MESSED UP BY LEAVING [2041] A TIP ON THIS TAPE. FAMILY PHOTOGRAPH. ALEX, THE BABY. YOU KNOW, THIS SISTER HERE, SHE'S EVEN HAD TO UNDERGO COUNSELING. I GOT SHIRLEY A JOB AT THAT KENTUCKY FRIED CHICKEN. I HAD ALWAYS PROTECTED HER

BECAUSE I WAS TWO YEARS OLDER. AND SHE IS BLAMING HERSELF. NOT EVEN HIM. SHE'S BLAMING HERSELF FOR HER SISTER BEING BUTCHERED TO DEATH. SHE'S GOT TO LIVE WITH THAT.

YOU HAVE HEARD EVERYBODY, EVERYBODY, SHIRLEY WAS JUST A PLEASURE TO BE AROUND. HAPPY, FILLED OUR LIVES. THE ONLY BAD THING I HEARD ANYBODY SAY ABOUT HER WAS THE DEFENDANT'S MOTHER AND SHE SAID SHE WAS A LITTLE SPACEY. WELL, THEY'VE CALLED ME WORSE THAN THAT, FOLKS. SHE WAS A LIFE. WHO STOPPED THAT?

THE LAST PHOTOGRAPH, THE LAST CHRISTMAS. YOU CAN SEE SHE'S PREGNANT IN THIS PICTURE.

MR. KIRKLAND: OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

THE SOLICITOR: NO MORE CHRISTMASES; NO MORE CELEBRATIONS TOGETHER.

ALL THAT IS LEFT NOW ARE PICTURES AND MEMORIES AND A SON THAT REMINDS FAMILY MEMBERS OF HER WHEN THEY SEE ALEX.

AND THE LAST VALENTINE GIFT FROM HIM TO HER. WHAT DID THEY SAY? SIDNEY BRUCE LOOKED JUST LIKE [2042] ALEX WHEN ALEX WAS BORN. A FAMILY TOGETHER, WORKING HARD TO BUILD A FAMILY, TO BUILD A HOME, TO LEAD A HAPPY LIFE. ALL COMPLETELY DEVASTATED, COMPLETELY WIPED OUT BY HIM, BY HIM, BY THAT WITH THIS. NOT ONE TIME, NOT TWO TIMES, NOT THREE TIMES, YOU COUNT THEM WHEN YOU GO BACK THERE.

AND WHAT DOES MR. SLADE AND MR. SHEALY SAY? ALEX TALKS ABOUT HIS MOTHER ALL THE TIME. HE WANTS TO GO SEE HER GRAVE. THAT'S ALL HE HAS NOW. A HEADSTONE TO SPEAK TO, A MOUND OF DIRT. REMEMBER LITTLE ALEX AT THAT WEDDING GOING AROUND SAYING A BAD MAN KILLED MY MAMA. A BAD MAN KILLED MY MAMA.

IF THIS IS A CASE FOR LIFE, THAT'S YOUR DECISION, ALL TWELVE OF YOU COLLECTIVELY. IF THAT IS JUSTICE.

AND WHAT IS HE DOING? THEY WILL TELL YOU, YOU OUGHT TO GIVE HIM LIFE BECAUSE HE COOPERATED WITH THE POLICE IN MASSACHUSETTS. AND THEN THEY TELL YOU, WELL, HE LIED TO THEM. HE MADE UP LIES. BUT HE KNEW SHE WAS PREGNANT.

MS. FULLWOOD: OBJECTION, YOUR HONOR.

THE COURT: OVERRULED.

THE SOLICITOR: HIS CONFESSION OVER THERE IN HIS HANDWRITING SAYS THAT. SO YOU GIVE IT WHATEVER WEIGHT YOU WANT TO. NOT ONLY THAT, MS. BARBARA ADAMS TESTIFIED TO IT. YOU LISTEN TO THE EVIDENCE AND BASE IT ON THAT.

THEY WILL TELL YOU, OH, HAVE MERCY ON HIM. YOU [2043] WON'T HEAR ANYTIME, FOLKS – WHEN I SIT DOWN, YOU WON'T HEAR ANYTHING ABOUT FRIDAY, JANUARY THE 5TH OF 1996, AND YOU WON'T HEAR ANYTHING ABOUT THAT KNIFE

GOING INTO SHIRLEY SHEALY AND YOU WON'T HEAR ANYTHING ABOUT KIDNAPPING, ARMED ROBBERY, BURGLARY, LARCENY WITH A DEADLY WEAPON, PHYSICAL TORTURE. YOU ARE NOT GOING TO HEAR THAT BECAUSE ALL YOU ARE GOING TO HEAR IS, OH, GIVE HIM LIFE. GIVE HIM LIFE.

AND I TELL YOU, IF THAT'S WHAT YOU WANT TO DO, BUT IF THIS CASE IS NOT FOR THE DEATH PENALTY, IF IT'S NOT RIGHT HERE, IT'S NOT RIGHT.

THERE WAS A HAPPY HOME THAT THIS PERSON DESTROYED, BUT, YOU KNOW WHAT, HE'S GOING TO BE ALL RIGHT NOW. DID HE CONTINUE TO BRAG ABOUT IT? YOU KNOW HE CARRIED A CUP AROUND OVER THERE IN THE JAIL, HAD A CHICKEN ON IT WITH HIS HEAD CUT OFF, WITH BLOOD GOING DOWN IT SAYING K.F.C. AND HE SAID I TRIED TO CUT HER HEAD OFF, BUT I COULDN'T.

MERCY? I'M GOING TO CLOSE WITH SOME OF THE LAST TESTIMONY YOU HEARD. HE KILLED MY WIFE. HE KILLED MY BEST FRIEND. HE KILLED MY BABY. AND I CAN'T GO HOME. THEIR DREAMS WENT RIGHT DOWN THE DRAIN LIKE SHIRLEY'S BLOOD WENT DOWN THE DRAIN OF KELLY, THE BUTCHER. THIS IS THEIR DREAMS. LIKE THIS BLOOD GOING DOWN THE DRAIN, MR. KELLY BUTCHERED SHIRLEY SHEALY. HE TURNED THIS [2044] INTO THIS. HE TOOK A HAPPY HOME /AND DEVASTATED IT. HE TOOK A WIFE AND A BEST FRIEND AND A MOTHER AND AN UNBORN CHILD BECAUSE OF THIS.

WE ARE ASKING FOR THE DEATH PENALTY. WE ARE SEEKING THE DEATH PENALTY AND WE EXPECT THE DEATH PENALTY. YOU REMEMBER WHAT ALEX HAS LEFT ON CHRISTMAS TO LEAVE SOME PRESENTS AT THE GRAVE AND TO GO BY AND PUT A LIFESAVER ON A MOUND OF DIRT HOPING THAT MY MAMA GETS IT.

FOLKS, IF YOU DON'T GIVE HIM THE DEATH PENALTY, ANYTHING LESS WILL BE THE FINAL STAB TO THE MEMORY OF SHIRLEY AND SIDNEY BRUCE.

[2049] **CLOSING ARGUMENTS BY THE DEFENSE**

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I DIDN'T MAKE THESE UP, FOLKS. THIS ISN'T JUST ME OR THE DEFENSE TEAM DRAWING THESE THINGS OUT OF THE AIR. THESE ARE CIRCUMSTANCES THAT OUR GENERAL ASSEMBLY CONSIDERED TO BE SIGNIFICANT ENOUGH TO HAVE JURIES CONSIDER AS MITIGATING, AS BEING IN FAVOR OF LIFE. AND IT'S EASY TO UNDERSTAND WHY. THE AGE, THE FACT OF NO PRIOR RECORD. I'M NOT TRYING TO MAKE AN EXCUSE FOR YOU. BUT PEOPLE SEE THINGS DIFFERENT WHEN THEY ARE YOUNGER. PEOPLE REACT DIFFERENT WENT [sic] THEY ARE YOUNGER. OUR GENERAL ASSEMBLY KNOWS THAT. IT ALSO KNOWS THAT WITH A YOUNG PERSON, WITH A PERSON WITH NO PRIOR

CRIMINAL RECORD, THE CHANCE OF REHABILITATION IS GREATER AND I'M NOT TALKING ABOUT REHABILITATION IN THE SENSE OF A WIFE AND A KID AND A CAR. THAT'S NEVER GOING TO HAPPEN, EVER, FOR BILLY KELLY. BUT IT DOES MEAN THAT HE IS CAPABLE OF LEADING A PEACEFULLY, NONVIOLENT LIFE WITHIN THE CONFINES OF AN INSTITUTION. SO HIS AGE AT THE TIME OF THE CRIME; THE FACT THAT HE WAS UNDER EIGHTEEN AT THE TIME OF THE CRIME; AND THE FACT THAT HE HAS NO PRIOR CRIMINAL RECORD ARE THINGS THAT OUR LAW SAY ARE MITIGATING AND THESE ARE THINGS YOU CAN CONSIDER AND THESE ARE THINGS YOU NEED TO CONSIDER BEFORE YOU MAKE UP YOUR MIND ABOUT WHAT IS THE RIGHT PUNISHMENT IN THIS CASE. I MEAN, LET'S MAKE IT CLEAR. WE ARE TALKING ABOUT PUNISHMENT. WE [sic] NOT TALKING ABOUT BEING SOFT OR HARD, EASY OR STRICT. WE ARE TALKING ABOUT PUNISHMENT, TWO VERY SEVERE PUNISHMENTS.

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[2050] IN THIS CASE, WE HAVE OFFERED SEVERAL. WE PUT UP EVIDENCE FOR YOU TO SEE THAT BILLY KELLY IS CAPABLE OF ADAPTING WELL TO LIFE IN AN INSTITUTION, TO DEMONSTRATE THAT HE WOULDN'T BE A DANGER THERE, HE WOULDN'T HURT ANYONE THERE, WHILE IT'S PROBABLY NOT GOING – WOULDN'T BE A PLEASANT PLACE FOR HIM TO LIVE AND HE PROBABLY NEVER WOULD LIKE IT VERY MUCH, HE COULD ADAPT. HE COULD MAKE THE ADJUSTMENT.

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[2051] BUT YOU KNOW WHAT, HE HAS THE BACKGROUND, THE UPBRINGING, NEVER BEEN IN TROUBLE BEFORE, HAD A MAMA AND A DADDY THAT SHOWS HE'S NOT ALL BAD. HE WAS RAISED RIGHT. DESPITE THE TERRIBLE THING HE'S DONE, HE'S GOT THE TOOLS TO LIVE THE RIGHT WAY IN AN INSTITUTION FROM NOW ON AND THESE ARE THINGS YOU NEED TO CONSIDER. THESE ARE THINGS THAT OUR LAW REQUIRES YOU TO CONSIDER. THE LAW NEVER EVER SAYS YOU HAVE

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[2055] BILLY KELLY REALLY ONLY HAS TWO CHOICES IN THIS WORLD. THAT'S DEATH OR DEATH. NOW, WHAT DO I MEAN BY THAT? EITHER HE CAN GO TO DEATH BY THE DEATH PENALTY AND HAVE THE PEACE OF MIND OF KNOWING THAT HIS FAITH IS SECURED, THAT THAT'S WHERE HE'S GOING AND DIES A SLOW PAINLESS DEATH. HE CAN DO THAT. OR HE CAN GO TO LIFE IN PRISON.

[2056] NOW, LET'S TALK ABOUT LIFE IN PRISON BECAUSE LIFE IN PRISON IS A TRUE PUNISHMENT AND I DON'T KNOW WHERE THIS HAS COME ABOUT OR SOME REASON PEOPLE HAVE THOUGHT LIFE IN PRISON, MAN, THAT'S A CAKEWALK. MAN, THAT AIN'T NO BIG DEAL. HE'S A SEVENTEEN-YEAR-OLD BOY. SHOOT, HE WILL HAVE A GREAT TIME. I DON'T UNDERSTAND WHERE THAT MENTALITY IS COMING FROM. I DON'T KNOW WHERE EVERYBODY IS GETTING THAT FROM. THIS IS A

HORRIBLE CASE. IT DESERVES A HORRIBLE, HORRIBLE SENTENCE. AND, LADIES AND GENTLEMEN, LIFE IN PRISON IS WORSE THAN DEATH BECAUSE IT'S A SLOW DEATH, A SLOW DEATH.

WELL, YOU CAN SAY, WELL, HE'S GOING TO SET UP HIS HOUSE AND HE'S GOING TO DO THIS. WE CAN ALL BE SNIDE ABOUT IT. WE CAN DO THAT SORT OF THING. BUT, LADIES AND GENTLEMEN, PRISON AIN'T PRETTY. AND THAT'S NOT COMING FROM US. THAT [sic] COMING FROM THE STATE'S OWN WITNESSES. Y'ALL WERE HERE LAST NIGHT. Y'ALL WERE HERE AND Y'ALL HEARD THE TESTIMONY OF THEIR WITNESSES, THE OFFICERS AND THE INMATES. YOU HAVE GOT TO WATCH YOUR BACK EVERYDAY, EVERY NIGHT. YOU DON'T KNOW IF YOU ARE GOING TO WAKE UP THE NEXT MORNING ALIVE.

IF YOU WANT BILLY KELLY TO PAY A PRICE FOR WHAT HE DID – I DO – MAKE HIM WONDER IF HE'S GOING TO LIVE OR DIE THAT NEXT MORNING, MAKE HIM WONDER IF HE'S GOING TO [2057] HAVE SOME MAN JUMPING ON HIS BACK THE NEXT MORNING, MAKE HIM WONDER WHO IS GOING TO BE HIS BOYFRIEND THE NEXT DAY. I'M NOT ASKING FOR MERCY. MR. MYERS SAID I WAS ASKING FOR MERCY.

I'M NOT ASKING FOR ANY MERCY. I'M NOT GOING TO INSULT YOU. I'M ASKING YOU TO PUNISH HIM, PUT HIM IN A SITUATION WHERE EVERY DAY IS GOING TO BE HELL AND IT WILL BE AND THEY CAN TAKE CARE OF HIM. YEAH, HE CAN ADAPT.

ADAPT IS SORT OF A FUNNY WORD. IT MAKES IT SOUND LIKE, OH, IF HE GOES IN THERE, OKAY, EVERYTHING WILL BE FINE AND DANDY. WHAT THAT MEANS IS BILLY KELLY CAN ADJUST TO LIFE AND THEY CAN HANDLE HIM. AND THEY CAN. THEY CAN HANDLE HIM.

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[2058] HIM TO PAY FOR WHAT HE DID THAT HORRIBLE NIGHT AND I WANT Y'ALL TO MAKE HIM PAY. DON'T SHOW MERCY, GIVE HIM LIFE IN PRISON.

[2060] **CHARGE TO THE JURY**

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(WHEREUPON, THE COURT CHARGED THE JURY AS FOLLOWS:)

THE COURT: MR. FOREMAN AND MEMBERS OF THE JURY, YOU HAVE HEARD THE TESTIMONY AND EVIDENCE AND ARGUMENTS OF THE STATE AND THE DEFENDANT. I WILL NOW EXPLAIN TO YOU THE LAW THAT APPLIES TO THIS CASE.

UNDER THE CONSTITUTION AND LAWS OF SOUTH CAROLINA, YOU ARE THE FINDERS OF THE FACTS IN THIS CASE. I DO NOT HAVE THE RIGHT TO PASS UPON THE FACTS OR EVEN TO EXPRESS ANY OPINION I MIGHT HAVE AS TO THEM.

ALSO, YOU ARE THE JUDGES, THE SOLE JUDGES, OF THE CREDIBILITY, THE BELIEVABILITY, OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE. IN PASSING UPON THEIR CREDIBILITY, [2061] YOU MAY TAKE INTO CONSIDERATION MANY THINGS, SUCH AS THE FOLLOWING:

THE DEMEANOR OR MANNER OF TESTIFYING;

WHETHER THE WITNESS HAD REASON TO BE BIASED OR PREJUDICED;

WHETHER A WITNESS' TESTIMONY WAS CONTRADICTED, ON THE ONE HAND, OR SUPPORTED AND CORROBORATED ON THE OTHER HAND.

NOW, OF COURSE, YOU CERTAINLY DO NOT DETERMINE THIS CREDIBILITY OR BELIEVABLE [sic] BY COUNTING THE NUMBER OF WITNESSES FOR EITHER SIDE. YOU MAY BELIEVE A SMALL PORTION OF A WITNESS' TESTIMONY AND DISREGARD THE LARGER OR VICE VERSA. YOU MAY BELIEVE ONE WITNESS AGAINST MANY, OR MANY AGAINST ONE. ALL THESE THINGS YOU CONSIDER, BEARING IN MIND THAT YOU SHOULD GIVE THE DEFENDANT THE BENEFIT OF A REASONABLE DOUBT.

NOW, I CHARGE USE FURTHER, MR. FOREMAN AND MEMBERS OF THE JURY, THE FACT THAT A DEFENDANT ELECTS NOT TO TESTIFY IN HIS OWN BEHALF CANNOT AND MUST NOT BE CONSIDERED AGAINST HIM UNDER ANY CIRCUMSTANCES OR IN ANY MANNER WHATSOEVER. THE DECISION OF ANY DEFENDANT NOT TO TAKE THE WITNESS STAND AND TESTIFY IN HIS OWN BEHALF DOES

NOT CREATE ANY INFERENCE AGAINST HIM. AND I TELL YOU THAT YOU MUST NOT PERMIT THAT FACT TO WEIGH IN EVEN THE SLIGHTEST DEGREE AGAINST THE DEFENDANT. YOU SHOULD NOT [2062] PERMIT THIS FACT TO ENTER INTO THE DISCUSSIONS OR DELIBERATIONS OF THE ISSUES IN THIS CASE.

NOW, LADIES AND GENTLEMEN, THE RULES OF EVIDENCE ORDINARILY DO NOT PERMIT WITNESSES TO TESTIFY AS TO THEIR OPINION OR CONCLUSIONS. AN EXCEPTION, HOWEVER, TO THIS RULE DOES EXIST AS TO THOSE TO WHOM WE CALL "EXPERT WITNESSES".

EXPERT WITNESSES ARE THOSE WHOM, BY EDUCATION AND EXPERIENCE, HAVE BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION OR CALLING. THESE WITNESSES MAY STATE THEIR OPINIONS AS TO RELEVANT AND MATERIAL MATTERS, IN WHICH THEY PROFESS TO BE EXPERTS, AND MAY ALSO STATE THE REASONS FOR THEIR OPINION.

YOU SHOULD CONSIDER EXPERT OPINION RECEIVED IN EVIDENCE IN THIS CASE, AND GIVE IT SUCH WEIGHT AS YOU MAY THINK IT DESERVES. IF YOU SHOULD DECIDE THAT THE OPINION OF AN EXPERT WITNESS IS NOT BASED UPON SUFFICIENT EDUCATION AND EXPERIENCE, OR IF YOU SHOULD CONCLUDE THAT THE REASONS GIVEN IN SUPPORT OF THOSE OPINIONS ARE NOT SOUND OR IF YOU FEEL THAT IT IS OUTWEIGHED BY THE OTHER EVIDENCE, YOU MAY DISREGARD THAT OPINION ENTIRELY.

NOW, BY THE SAME CONSTITUTION AND LAW WHICH MAKES YOU THE FINDERS OF THE FACTS AND THE EVIDENCE AS I HAVE DISCUSSED WITH YOU, I AM, AS THE JUDGE, MADE THE SOLE AND ONLY INSTRUCTOR IN THE LAW. YOU MUST ACCEPT AS CORRECT THE [2063] LAW WHICH I CHARGE AND APPLY IT TO THE EVIDENCE AS YOU FIND IT, AND REACH YOUR VERDICT.

AND FINALLY, I CHARGE YOU IN THIS REGARD: THAT YOU OR FOR THAT MATTER, I, SHOULD NOT BE CONCERNED ABOUT WHAT WE THINK THE LAW OUGHT TO BE, BUT RATHER WHAT I CHARGE YOU THE LAW TO BE.

LADIES AND GENTLEMEN, THERE ARE TWO TYPES OF EVIDENCE WHICH ARE GENERALLY PRESENTED DURING A TRIAL: DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO ASSERTS OR CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS A EYEWITNESS.

CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE CONSIDERATION OR VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE, NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN THAT OF DIRECT EVIDENCE. YOU SHOULD CONSIDER ALL THE EVIDENCE IN THIS CASE.

NOW, LADIES AND GENTLEMEN OF THE JURY, I FURTHER CHARGE YOU THAT EVIDENCE OF PRIOR CRIMES OR MISCONDUCT BY THE DEFENDANT SHOULD NOT BE CONSIDERED AND MAY NOT BE USED AS PROOF OF ANY STATUTORY AGGRAVATING CIRCUMSTANCES ABOUT WHICH I WILL INSTRUCT YOU SHORTLY. HOWEVER, YOU MAY [2064] CONSIDER SUCH EVIDENCE ONLY AS TO THE DEFENDANT'S CHARACTER, HIS CHARACTERISTICS, BUT NOT AS PROOF OF THE ALLEGED STATUTORY AGGRAVATING CIRCUMSTANCES.

NOW, AGGRAVATING CRIMES ARE COMMITTED WHILE IN THE COMMISSION – WHILE IN COMMISSION OF A MURDER WHEN THEY ARE CONSUMMATED IN A CONTINUOUS SERIES OF ACTS WITH THE MURDER AND ARE IN THE SAME PLACE AND ARE NOT SEPARATED BY ANY SUBSTANTIAL LAPSE OF TIME. THE FACT THAT THE CRIMES ARE COMMITTED AFTER THE MURDER DOES NOT INVALIDATE THEM AS STATUTORY AGGRAVATING CIRCUMSTANCES.

NOW, LADIES AND GENTLEMEN OF THE JURY, BEFORE I CHARGE YOU AND EXPLAIN TO YOU THE STATUTORY AGGRAVATING CIRCUMSTANCES THAT ARE ALLEGED, I'M GOING TO GIVE YOU THE LAW OR CHARGE YOU OR INSTRUCT YOU AS TO THE LAW IN RESPECT TO THE VARIOUS AGGRAVATING CIRCUMSTANCES.

KIDNAPPING. THE DEFENDANT IN THIS CASE IS CHARGED – IS ALLEGED – THE DEFENDANT IN THIS

CASE HAS A AGGRAVATING CIRCUMSTANCE ALLEGED AGAINST HIM AS TO KIDNAPPING.

KIDNAPPING IS THE INTENTIONAL TAKING OF A PERSON AND COMPELLING HER TO BE DETAINED AGAINST HER WILL. IT IS THE WILLFUL AND UNLAWFUL SEIZING OF A PERSON AGAINST HER WILL WITH AN INTENT TO CAUSE HER TO BE CONFINED, IMPRISONED OR DETAINED. THE ESSENCE OF THE OFFENSE OF KIDNAPPING IS THE UNLAWFUL SECRET HOLDING OR IMPRISONMENT OF A PERSON. [2065] KIDNAPPING MEANS THE CARRYING AWAY OF A PERSON BY UNLAWFUL FORCE OR BY FRAUD OR AGAINST HER WILL OR SEIZING AND DETAINING HER FOR THE PURPOSE OF SO CARRYING HER AWAY. THE GRAVAMEN OF THE OFFENSE OF KIDNAPPING IS SOME FORM OF COMPULSION, BUT THE LAW SAYS THAT THE REQUISITE FORCE OR COMPULSION NEED NOT CONSISTS [sic] OF THE USE OF ACTUAL PHYSICAL FORCE OR VIOLENCE OR OF EXPRESSED THREATS. AN ESSENTIAL ELEMENT OF THE OFFENSE OF KIDNAPPING IS THAT THE TAKING OR DETENTION OF THE PERSON KIDNAPPED IS WITHOUT LAWFUL AUTHORITY.

NOW, ANOTHER AGGRAVATING CIRCUMSTANCE IS IN THE FORM OF BURGLARY.

NOW, BURGLARY, AS IT RELATES TO THIS CASE: THE STATE MUST PROVE FOUR ELEMENTS.

FIRST, THAT A PERSON MUST ENTER A BUILDING. SECONDLY, THAT THAT ENTERING MUST BE WITHOUT CONSENT. THIRDLY, WITH AN INTENT TO COMMIT A CRIME THEREIN. FOURTHLY, THAT THE

ENTERING OR REMAINING IN THE BUILDING OCCURS IN THE NIGHTTIME AND WHEN EFFECTING ENTRY OR WHILE IN THE BUILDING OR WHEN IN THE IMMEDIATE FLIGHT THEREFROM, THAT THE DEFENDANT OR ANY PARTICIPANT IN THE CRIME DID ANY ONE OF THE FOLLOWING: WAS ARMED WITH A DEADLY WEAPON OR CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT OF THE CRIME OR USES OR THREATENS THE USE OF A DANGEROUS INSTRUMENT OR DISPLAYS WHAT IS OR APPEARS [sic] BE A [2066] KNIFE.

NOW, ANOTHER AGGRAVATING CIRCUMSTANCE IS ARMED ROBBERY, AS WELL AS LARCENY, AND THOSE TWO CRIMES ARE CONTAINED WITHIN MY CHARGE ON ARMED ROBBERY.

WHAT IS ARMED ROBBERY? THE CRIME OF ARMED ROBBERY INCLUDES ALL THE ELEMENTS OF LARCENY AND ROBBERY.

WHAT THEN IS LARCENY? I CHARGE YOU THAT THERE ARE FOUR ELEMENTS WHICH MUST BE PRESENT AND ESTABLISHED BEYOND A REASONABLE DOUBT TO MAKE OUT THE CRIME OF LARCENY. THESE FOUR ELEMENTS ARE: THAT THERE WAS A TAKING; THAT THE TAKING WAS OF PERSONAL PROPERTY; THAT AFTER BEING TAKEN, THE PROPERTY WAS CARRIED AWAY; THAT THE TAKING AND CARRYING AWAY OF THE PROPERTY WAS DONE WITH THE INTENT TO STEAL.

AND I CHARGE YOU THAT UNITED STATES CURRENCY IS PERSONAL PROPERTY.

ROBBERY INCLUDES EACH OF THE FOUR ELEMENTS I HAVE JUST EXPLAINED.

IN ADDITION TO THESE FOUR ELEMENTS, TWO OTHER ELEMENTS ARE NECESSARY TO MAKE OUT THE CRIME OF ROBBERY. THOSE ELEMENTS ARE: THAT THE PROPERTY MUST BE TAKEN FROM THE PERSON OF ANOTHER OR IN HIS PRESENCE AND THAT THE TAKING AND CARRYING AWAY OF THE PROPERTY MUST BE – MUST HAVE BEEN ACCOMPLISHED BY PLACING THE OTHER PERSON IN FEAR BY VIOLENCE OR THREATS OF VIOLENCE SO AS TO MAKE THAT PERSON SURRENDER THE PROPERTY WITHOUT THEIR CONSENT AND [2067] AGAINST THEIR WILL.

THEREFORE, THE CRIME OF ARMED ROBBERY INCLUDES ALL OF THE ELEMENTS OF LARCENY AND ROBBERY. AND IN ORDER TO MAKE OUT THE CRIME OF ARMED ROBBERY, HOWEVER, AN ADDITIONAL ELEMENT MUST BE PROVED. THE ROBBERY MUST HAVE BEEN COMMITTED WHILE ARMED WITH A DEADLY WEAPON. THE PERSON COMMITTING THE ROBBERY MUST HAVE HAD AND USED A DEADLY WEAPON WITH WHICH HE ATTAINED POSSESSION OF THE PROPERTY OR PLACED THE ONE POSSESSING THE PROPERTY IN FEAR IN ORDER TO OBTAIN THE PROPERTY.

SECTION 16-11-330(A) OF THE CODE OF LAWS OF THE STATE OF SOUTH CAROLINA, 1976, AS AMENDED PROVIDES: A PERSON COMMITTED FOR THE CRIME OF ROBBERY WHILE ARMED WITH A PISTOL, DIRK, SLINGSHOT, METAL KNUCKLES,

RAZOR OR OTHER DEADLY WEAPON COMMITS ARMED ROBBERY.

AND I CHARGE YOU THAT A KNIFE IS A WEAPON IN ACCORDANCE WITH THIS STATUTE.

NOW ANOTHER AGGRAVATING CIRCUMSTANCE IS THAT OF PHYSICAL TORTURE.

LADIES AND GENTLEMEN OF THE JURY, TORTURE OCCURS WHEN THE VICTIM IS SUBJECTED TO SERIOUS PHYSICAL ABUSE BEFORE DEATH. TORTURE OCCURS WHEN THE VICTIM IS SUBJECTED TO AGGRAVATED BATTERY.

WHAT IS AGGRAVATED BATTERY? AN AGGRAVATED BATTERY IS AN UNLAWFUL ACT OF VIOLENT INJURY TO THE PERSON [2068] OF ANOTHER ACCOMPANIED BY CIRCUMSTANCES OF AGGRAVATION. SUCH AS THE USE OF A DANGEROUS OR DEADLY OBJECT, THE INFLICTION OF SERIOUS BODILY INJURY WITH INTENT TO COMMIT A FELONY, A GREAT DISPARITY BETWEEN THE AGES AND PHYSICAL CONDITION OF THE PARTIES, A DIFFERENCE IN THE SEXES.

PHYSICAL TORTURE IS THE INTENTIONAL INFLICTION OF SERIOUS, VILE, HORRIBLE OR INHUMAN ABUSE UPON THE BODY OF ANOTHER BEFORE DEATH. THE INSTANTANEOUS DEATH OF THE VICTIM DOES NOT CONSTITUTE TORTURE. PHYSICAL TORTURE MAY INCLUDE THE MALICIOUS INFLICTION OF BODILY HARM TO ANOTHER BY DEPRIVING HER OF A MEMBER OF HER BODY OR BY RENDERING A MEMBER OF HER BODY USELESS OR BY SERIOUSLY

DISFIGURING HER BODY OR A MEMBER OF HER BODY OR THE INTENTIONAL AND UNMERCIFUL PROLONGING OF SEVERE PAIN AND ABUSE UPON THE BODY OR THE INTENTIONAL AND UNMERCIFUL INFLICTION OF SERIOUS AND EXTENSIVE PHYSICAL PAIN AND ABUSE TO THE BODY OF ANOTHER.

MR. FOREMAN AND MEMBERS OF THE JURY, IT NOW BECOMES YOUR DUTY TO DECIDE WHAT SENTENCE YOU WILL RECOMMEND THAT THIS COURT IMPOSE UPON THE DEFENDANT, WILLIAM ARTHUR KELLY.

THERE ARE TWO VERDICTS THAT YOU ARE TO CONSIDER IN THIS CASE.

ONE IS THE DEATH PENALTY, WHICH IN THIS STATE, IS BY ELECTROCUTION OR LETHAL INJECTION, AND THE OTHER IS LIFE [2069] IMPRISONMENT.

AND I CHARGE YOU THAT THE TERMS "LIFE IMPRISONMENT" AND "DEATH SENTENCE" ARE TO BE UNDERSTOOD IN THIS ORDINARY AND PLAIN MEANING.

PLEASE UNDERSTAND, LADIES AND GENTLEMEN OF THE JURY, THAT YOUR SENTENCING RECOMMENDATION WILL BE FOLLOWED BY THIS COURT.

NOW, THE ORDER IN WHICH I EXPLAIN THESE TWO SENTENCES IS IN NO WAY A RECOMMENDATION BY THIS COURT AS TO WHICH SENTENCE YOU SHOULD CONSIDER TO RECOMMEND. IT IS SIMPLY THAT ONE MUST BE STATED FIRST.

NOW, I HOLD IN MY HAND, A RECOMMENDATION OF DEATH PENALTY FORM.

BY THIS RECOMMENDATION OF SENTENCE FORM, WHICH I HOLD IN MY HAND, YOU, THE JURY, MAY RECOMMEND THAT THIS COURT SENTENCE THE DEFENDANT TO DEATH. PLEASE OBSERVE THAT IMMEDIATELY BELOW THE BODY OF THE RECOMMENDATION, THERE ARE TWELVE LINES. THIS IS WHERE, SHOULD YOU DECIDE TO RECOMMEND THE DEATH PENALTY, EACH ONE OF YOU WOULD SIGN YOUR NAME. IT IS THE LAW IN THIS STATE, MR. FOREMAN AND MEMBERS OF THE JURY, THAT A RECOMMENDATION FOR IMPOSITION OF THE DEATH PENALTY BE A UNANIMOUS RECOMMENDATION AND THAT EACH AND EVERY JUROR SIGN HIS OR HER NAME ON THE RECOMMENDATION FORM.

I WILL NOW READ TO YOU THE TEXT OF THIS FORM AND [2070] I QUOTE: "WE, THE JURY IN THE ABOVE-ENTITLED CASE, HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES, TO WIT: AND AT THIS POINT, THERE IS A PLACE PROVIDED FOR YOU TO WRITE SUCH CIRCUMSTANCES ABOUT WHICH I WILL INSTRUCT YOU FURTHER. "NOW RECOMMEND TO THE COURT, THAT THE DEFENDANT, WILLIAM ARTHUR KELLY, BE SENTENCED TO DEATH."

NOW, FOR THIS RECOMMENDATION TO BE MADE, THAT IS, THAT THE DEFENDANT BE SENTENCED TO DEATH, YOU MUST FIRST FIND THAT A

STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED BEYOND A REASONABLE DOUBT.

WHAT IS A STATUTORY AGGRAVATING CIRCUMSTANCE? IT IS A FACT, AN INCIDENT, A DETAIL OR AN OCCURRENCE WHICH THE SOUTH CAROLINA GENERAL ASSEMBLY HAS DECLARED BY STATUTE WOULD MAKE WORSE, THAT IS, TO AGGRAVATE THE OFFENSE OF MURDER WHEN THE TWO OCCUR TOGETHER.

IN OTHER WORDS, IT IS SOMETHING WHICH INCREASES THE ENORMITY, OR ADDS TO THE INJURIOUS CONSEQUENCES OF THE OFFENSE.

NOW, LADIES AND GENTLEMEN, UPON THIS SHEET OF PAPER WHICH I HOLD IN MY HAND ARE WRITTEN THE WORDS, "STATUTORY INSTRUCTIONS". YOU WILL HAVE THIS PAPER IN YOUR JURY ROOM DURING YOUR DELIBERATIONS.

THE BODY OF THIS FORM STATES AND I QUOTE: "IN [2071] DETERMINING WHETHER TO RECOMMEND THAT THE DEFENDANT, WILLIAM ARTHUR KELLY, BE SENTENCED BY THE COURT TO LIFE IMPRISONMENT OR TO DEATH, YOU MAY CONSIDER THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES: AND I HAVE CHARGED YOU OR EXPLAINED TO YOU OR INSTRUCTED YOU THE LAW THAT APPLIES TO THESE VARIOUS STATUTORY AGGRAVATING CIRCUMSTANCES AND THEY ARE AS FOLLOWS:

THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF KIDNAPPING.

THE MURDER WAS COMMITTED WHITE [sic] IN THE COMMISSION OF BURGLARY.

THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF ROBBERY WHILE ARMED WITH A DEADLY WEAPON.

THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF LARCENY WITH THE USE OF A DEADLY WEAPON.

AND THE MURDER WAS COMMITTED WHILE IN THE COMMISSION OF PHYSICAL TORTURE."

LET ME EMPHASIZE TO YOU THAT THESE ARE THE ONLY CIRCUMSTANCES YOU MAY CONSIDER AS AGGRAVATING CIRCUMSTANCES. SHOULD YOU FIND – AND IT MUST BE A UNANIMOUS FINDING, THAT IS, A FINDING BY EACH AND EVERY ONE OF YOU – SHOULD YOU FIND THAT THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT THE EXISTENCE OF ONE OR MORE OF THE CIRCUMSTANCES LISTED ON THIS SHEET OF PAPER, THEN YOU WOULD BE AUTHORIZED, WHICH IS TO SAY PERMITTED, TO CONSIDER [2072] RECOMMENDING TO THIS COURT THAT THE DEFENDANT BE SENTENCED TO DEATH.

NOW, WHAT DO I MEAN BY THE TERM, PROVEN BEYOND A REASONABLE DOUBT? NOW, A REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

AND THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A REASONABLE

DOUBT. SOME OF YOU MAY HAVE SERVED AS JURORS IN CIVIL CASES WHERE YOU WERE TOLD THAT IT IS ONLY NECESSARY TO PROVE THAT A FACT IS MORE LIKELY TRUE THAN NOT TRUE.

IN CRIMINAL CASES, THE STATE'S PROOF MUST BE MORE POWERFUL THAN THAT. IT MUST BE BEYOND A REASONABLE DOUBT. PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT. THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH ABSOLUTE CERTAINTY. AND IN CRIMINAL CASES, THE LAW DOES NOT REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. AND, PLEASE, PAY PARTICULAR ATTENTION TO THIS. YOU ARE NEVER REQUIRED TO RECOMMEND THE DEATH PENALTY, EVEN IF YOU FIND THAT A STATUTORY AGGRAVATING CIRCUMSTANCE EXISTED AT THE TIME THE OFFENSE OCCURRED.

HOWEVER, IF YOU FIND THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE, THEN PLEASE LIST THAT CIRCUMSTANCE ON THE FORM ENTITLED "AGGRAVATING [2073] CIRCUMSTANCES" AND ALL TWELVE JURORS WILL SIGN THIS FORM.

AND I HOLD IN MY HAND THE AGGRAVATING CIRCUMSTANCES FORM WHICH SAYS, WE, THE JURY IN THE ABOVE-ENTITLED CASE, FIND BEYOND A REASONABLE DOUBT THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES.

AND YOU WOULD LIST THE CIRCUMSTANCES THAT YOU FIND BEYOND A REASONABLE DOUBT,

UNANIMOUSLY, IF THERE ARE THOSE, MR. FOREMAN AND LADIES AND GENTLEMEN.

NOW, I INSTRUCT YOU FURTHER THAT SHOULD YOU FIND THAT THE STATE HAS NOT PROVEN THAT SUCH A CIRCUMSTANCE OR CIRCUMSTANCES EXISTED; THAT IS, TO SAY YOU FIND THAT YOU STILL HAVE A REASONABLE DOUBT AS TO THE EXISTENCE OF SUCH A CIRCUMSTANCE, THEN YOU WOULD NOT BE AUTHORIZED TO RECOMMEND THE DEATH PENALTY AND YOUR RECOMMENDATION MUST BE LIFE IN PRISON.

NOW, SHOULD YOU FIND BEYOND A REASONABLE DOUBT THAT ONE OF THE AGGRAVATING CIRCUMSTANCES LISTED ON THE SHEET OF "STATUTORY INSTRUCTIONS" EXISTED AT THE TIME OF THE MURDER, AND SHOULD YOU DECIDE, AFTER CONSIDERING THE ELEMENTS IN FAVOR OF A RECOMMENDATION OF LIFE IMPRISONMENT, ABOUT WHICH I WILL INSTRUCT YOU SHORTLY, THAT THE RECOMMENDATION OF THE JURY IS TO BE THAT THE DEFENDANT BE SENTENCED TO DEATH, THEN IT WOULD BE YOUR DUTY, MR. FOREMAN, TO WRITE ON THE RECOMMENDATION OF SENTENCE FORM [2074] AND I HOLD IN MY HAND THE "RECOMMENDATION OF DEATH PENALTY" FORM THE STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WHICH YOU HAVE FOUND.

THEN, MR. FOREMAN, YOU AND EACH AND EVERY JUROR WOULD SIGN YOUR NAMES IN THE SPACES PROVIDED.

DO YOU UNDERSTAND?

THE FOREMAN: YES.

THE COURT: NOW, BY THIS FORM WHICH I HOLD IN MY HAND, YOU, THE JURY, CAN RECOMMEND TO THIS COURT THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT.

I WILL NOW READ TO YOU THE TEXT OF THIS RECOMMENDATION FORM:

"WE, THE JURY, IN THE ABOVE-ENTITLED CASE, RECOMMEND TO THE COURT THAT THE DEFENDANT, WILLIAM ARTHUR KELLY, BE SENTENCED TO LIFE IMPRISONMENT."

PLEASE NOTE THAT ALTHOUGH YOU MUST UNANIMOUSLY AGREE TO RECOMMEND LIFE IMPRISONMENT, ONLY THE FOREMAN IS REQUIRED TO SIGN THIS FORM.

I WILL NOW INSTRUCT YOU ON WHAT YOU MAY CONSIDER IN MAKING YOUR DECISION AS TO WHICH SENTENCE TO RECOMMEND.

AS I PREVIOUSLY INSTRUCTED, IF YOU FIND THE EXISTENCE BEYOND A REASONABLE DOUBT OF A STATUTORY AGGRAVATING CIRCUMSTANCE, THEN YOU ARE NOT PERMITTED, BUT NOT REQUIRED, TO RECOMMEND THE DEATH PENALTY. THERE ARE THREE CONDITIONS WHICH YOU SHOULD CONSIDER IN REACHING YOUR [2075] DECISION:

FIRST, WHETHER THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE WAS SUPPORTED BY THE EVIDENCE.

SECONDLY, WHETHER THE EXISTENCE OF ANY OTHER NON-STATUTORY MITIGATING CIRCUMSTANCES WAS SUPPORTED BY THE EVIDENCE.

THIRD, WHETHER FOR ANY REASON YOU CAN THINK OF OR FOR NO REASON AT ALL, THE DEFENDANT SHOULD BE A [sic] SENTENCED TO LIFE IMPRISONMENT.

NOW, WHAT IS A "STATUTORY MITIGATING CIRCUMSTANCE"?

IT IS A FACT, AN INCIDENT, A DETAIL OR AN OCCURRENCE WHICH THE SOUTH CAROLINA GENERAL ASSEMBLY HAS DECLARED BY STATUTE WOULD REDUCE THE SEVERITY OF THE OFFENSE OF MURDER.

IN OTHER WORDS, IT IS A CIRCUMSTANCE RECOGNIZED BY STATUTE AS ONE WHICH, IN FAIRNESS AND MERCY, MAY BE CONSIDERED AS EXTENUATING OR AS REDUCING THE DEGREE OF MORAL CULPABILITY FOR THE COMMISSION OF THE ACT OF MURDER.

A MITIGATING CIRCUMSTANCE IS NEITHER JUSTIFICATION NOR EXCUSE FOR THE MURDER. IT SIMPLY LESSENS THE DEGREE OF ONE'S GUILT; THAT IS, MAKES HIM LESS BLAMEWORTHY OR LESS CULPABLE.

WHAT STATUTORY MITIGATING CIRCUMSTANCES SHOULD YOU CONSIDER?

[2076] AND I REFER, ONCE AGAIN, TO THIS SHEET OF PAPER ENTITLED, "STATUTORY INSTRUCTIONS".

AND IMMEDIATELY BELOW THE FIVE STATUTORY AGGRAVATING CIRCUMSTANCES THAT I HAVE PREVIOUSLY READ TO YOU, THE TEXT CONTINUES AND I QUOTE: "YOU MAY ALSO CONSIDER THE FOLLOWING STATUTORY MITIGATING CIRCUMSTANCES: THE DEFENDANT HAD – EXCUSE ME. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CONVICTION INVOLVING THE USE OF VIOLENCE AGAINST ANOTHER PERSON.

THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

THE DEFENDANT WAS BELOW THE AGE OF EIGHTEEN AT THE TIME OF THE CRIME.

THOSE ARE THE THREE STATUTORY MITIGATING CIRCUMSTANCES THAT ARE LISTED ON THIS FORM.

AND, MR. FOREMAN AND LADIES AND GENTLEMEN, YOU MAY ALSO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES."

NOW, WHILE THERE MUST BE SOME EVIDENCE WHICH SUPPORTS A FINDING BY YOU THAT A STATUTORY OR A NON-STATUTORY CIRCUMSTANCE EXISTS, AND IT IS NOT NECESSARY FOR YOU TO FIND THE EXISTENCE OF SUCH A CIRCUMSTANCE UNANIMOUSLY NOR BEYOND A REASONABLE DOUBT.

IN REACHING YOUR DECISION AS TO WHICH SENTENCE YOU RECOMMEND, YOU WILL CONSIDER

THE AGGRAVATING AND [2077] MITIGATING CIRCUMSTANCES.

WHILE AN AGGRAVATING CIRCUMSTANCE MUST BE FOUND BEFORE YOU CAN EVEN CONSIDER RECOMMENDING THE DEATH PENALTY, ONCE SUCH A FINDING IS MADE BEYOND A REASONABLE DOUBT, YOU MAY RECOMMEND THE DEATH SENTENCE EVEN THOUGH YOU FIND THE EXISTENCE OF A STATUTORY MITIGATING CIRCUMSTANCE OR A NON-STATUTORY MITIGATING CIRCUMSTANCE OR BOTH.

IN OTHER WORDS, THE EXISTENCE OF AN ALLEGED STATUTORY MITIGATING CIRCUMSTANCES, [sic] AN ALLEGED NON-STATUTORY MITIGATING CIRCUMSTANCE OR BOTH IS NOT A BAR TO THE IMPOSITION OF THE DEATH PENALTY.

THE THIRD ELEMENT YOU MAY CONSIDER IF YOU SHOULD CONCLUDE THAT A STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS IS WHETHER THE DEFENDANT SHOULD BE SENTENCED TO LIFE IMPRISONMENT FOR ANY REASON, OR FOR NO REASON AT ALL. THIS IS WHAT HAS BEEN TRADITIONALLY REFERRED TO AS A "RECOMMENDATION OF MERCY", AND SHOULD YOUR DECISION BE SUCH, YOU WOULD SO INDICATE BY RETURNING TO THE COURT THE FORM THE "RECOMMENDATION OF LIFE IMPRISONMENT", WHICH WILL BE SIGNED BY THE FOREMAN ALONE.

IN OTHER WORDS, YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT IF YOU FIND A STATUTORY OR NON-STATUTORY MITIGATING

CIRCUMSTANCE OR YOU MAY CHOOSE TO RECOMMEND LIFE IMPRISONMENT AS AN ACT OF MERCY.

IN ANY INSTANCE, SHOULD YOU CHOOSE TO RECOMMEND [2078] LIFE IMPRISONMENT, YOUR DECISION MUST BE A UNANIMOUS ONE, AND ONE THAT THE FOREMAN ALONE WOULD BE REQUIRED TO SIGN ON THE RECOMMENDATION FORM.

LET ME SUMMARIZE TO YOU WHAT I HAVE JUST TOLD YOU.

YOU HAVE IN THE JURY ROOM DURING YOUR DELIBERATIONS FOUR FORMS.

RECOMMENDATION OF LIFE IMPRISONMENT FORM;

RECOMMENDATION OF DEATH PENALTY FORM;

STATUTORY INSTRUCTIONS;

AGGRAVATING CIRCUMSTANCES.

THE STATUTORY INSTRUCTIONS STATE THE ONLY AGGRAVATING CIRCUMSTANCES YOU SHALL CONSIDER IN THIS CASE. SHOULD YOU FAIL TO FIND BEYOND A REASONABLE DOUBT THAT AT LEAST ONE OF THESE CIRCUMSTANCE [sic] EXISTED AT THE TIME THE MURDER WAS COMMITTED, THEN YOU WOULD GO NO FURTHER. YOUR RECOMMENDATION MUST BE FOR LIFE IMPRISONMENT.

SHOULD YOU FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES, YOU WOULD

THEN BE AUTHORIZED TO CONSIDER RECOMMENDING THE DEATH PENALTY. IN YOUR DELIBERATIONS, YOU WILL CONSIDER ANY STATUTORY OR NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH ARE SUPPORTED BY THE EVIDENCE. YOU WILL CONSIDER THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES YOU FOUND AND THE MITIGATING CIRCUMSTANCES AND YOU WILL THEN DECIDE WHETHER [2079] YOU WILL RECOMMEND THE DEATH OR LIFE IMPRISONMENT.

YOU MAY ALSO CONSIDER ANY OTHER FACTOR IN MITIGATION OF THE OFFENSE, AND YOU CAN RECOMMEND A SENTENCE OF LIFE IMPRISONMENT FOR NO REASON AT ALL.

IF YOU DECIDE TO RECOMMEND THE DEATH PENALTY, YOU WILL COMPLETE THE PROPER FORM. YOU MUST WRITE OUT THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES THAT YOU FOUND, AND ALL TWELVE JURORS MUST SIGN THE RECOMMENDATION.

SHOULD YOU DECIDE TO RECOMMEND LIFE IMPRISONMENT, ONLY THE FOREMAN MUST SIGN THE RECOMMENDATION AND NO REASON IS TO [sic] GIVEN FOR YOUR DECISION.

WHATEVER YOUR RECOMMENDATION IS, IT MUST BE A UNANIMOUS ONE; THAT IS, TO SAY, IT MUST BE THE VERDICT OF EACH AND EVERY JUROR.

AND PLEASE REMEMBER THAT YOUR SENTENCING RECOMMENDATION WILL BE FOLLOWED BY THIS COURT.

IN CONSIDERING WHETHER TO RECOMMEND THE DEFENDANT IS TO BE SENTENCED TO DEATH OR LIFE IMPRISONMENT, I CHARGE YOU THAT AS JURORS YOU MUST DECIDE THE ISSUE INVOLVED IN THIS PROCEEDING WITHOUT BIAS AND WITHOUT PREJUDICE TO ANY PARTY.

YOU HAVE BEEN SELECTED AS FAIR AND IMPARTIAL JURORS SWORN TO IMPARTIALLY TRY AND DETERMINE THE FACTS OF THIS CASE, AND WHEN YOU COMPLY WITH YOUR OATH TO DO SO, THEN NO ONE WILL HAVE A RIGHT TO CRITICIZE YOUR VERDICT AND [2080] YOU WILL HAVE FULLY DISCHARGED YOUR DUTY AS JURORS.

YOU ARE TO DECIDE THIS CASE FROM THE TESTIMONY THAT YOU HAVE HEARD FROM THE LIPS OF THE SWORN WITNESSES, ALONG WITH THE OTHER EVIDENCE THAT HAS BEEN INTRODUCED.

I FURTHER CHARGE YOU THAT AS JURORS, YOU MUST DECIDE THE ISSUES IN THIS PROCEEDING WITHOUT BIAS AND WITHOUT PREJUDICE TO ANY PARTY.

YOU CANNOT ALLOW YOURSELF TO BE GOVERNED BY SYMPATHY, BY PREJUDICE, BY PASSION, BY PUBLIC OPINION OR ANY OTHER ARBITRARY FACTOR. BOTH THE STATE AND THE DEFENDANT HAVE THE RIGHT TO EXPECT THAT EACH OF YOU WILL CAREFULLY AND IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THE CASE AND THAT YOU WILL FOLLOW THE LAW AS I HAVE EXPLAINED IT TO YOU.

NOW, LADIES AND GENTLEMEN, BEFORE I SEND YOU TO THE JURY ROOM, MR. FOREMAN, LET ME SUGGEST THAT AS YOU GO TO THE JURY ROOM – AND YOU WILL BE INSTRUCTED IN A MOMENT ABOUT YOUR DELIBERATIONS – THAT WHEN YOU BEGIN THAT PROCESS, THAT YOU READ OVER THE "STATUTORY INSTRUCTIONS" AND THEN THAT YOU CONSIDER WHETHER OR NOT THERE IS THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES. IF AN AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES ARE FOUND, THEN THEY MUST BE LISTED ON THIS FORM AND EACH AND EVERY JUROR MUST AFFIX THEIR NAME TO THE FORM AND PLEASE DATE IT TODAY WHICH IS SEPTEMBER 19TH.

[2081] AND, THEREAFTER, IF A STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES IS FOUND, THEN YOU MAY CONSIDER THE RECOMMENDATION OF A SENTENCE OF THE DEATH PENALTY. AND, ONCE AGAIN, IF THE JURY UNANIMOUSLY DETERMINES THAT BEYOND A REASONABLE DOUBT, THEN YOU WOULD LIST THE AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES THAT YOU HAVE FOUND AND EACH AND EVERY JUROR WOULD SIGN THEIR NAME TO THAT FORM AND DATE IT TODAY.

NOW, EVEN WITH THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES, YOU MAY STILL RETURN A LIFE SENTENCE FOR ANY REASON OR FOR NO REASON AT ALL. AND IF YOU DO THAT UNANIMOUSLY, MR. FOREMAN, THEN YOU WOULD SIMPLY SIGN YOUR NAME AND DATE THIS FORM TODAY.

NOW, MR. FOREMAN AND LADIES AND GENTLEMEN, I'M GOING TO BE SENDING YOU TO THE JURY ROOM IN JUST A MOMENT. AND WOULD THE BAILIFFS PLEASE STAND THE ALTERNATE JURORS ASIDE AS THEY ARE DISMISSED.

DO NOT BEGIN YOUR DELIBERATIONS UNTIL I SEND WORD FOR YOU TO DO SO. I'M GOING TO TALK WITH THE LAWYERS AT THIS POINT AND IT MAY BE NECESSARY THAT I CALL YOU BACK INTO THE COURTROOM. HOWEVER, IF I DO THAT, THEN IT WOULD BE VERY QUICKLY.

ONCE AGAIN, PLEASE FILL OUT THE FORMS AS I HAVE INSTRUCTED YOU. ALSO, KEEP IN MIND THAT YOUR VERDICT MUST BE UNANIMOUS AS TO BOTH RECOMMENDATIONS. ALSO, KEEP IN MIND [2082] THAT YOUR DECISION AND YOUR VERDICT AS TO AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES MUST BE UNANIMOUS AND MUST BE BEYOND A REASONABLE DOUBT. THAT YOUR CONSIDERATION OF MITIGATING CIRCUMSTANCES DO NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT, AS WELL AS ANY NON-STATUTORY MITIGATING CIRCUMSTANCES.

ONCE AGAIN, LADIES AND GENTLEMEN, KEEP IN MIND THAT YOUR VERDICT MUST BE UNANIMOUS. THE WORD VERDICT COMES FROM THE LATIN WORD, "VEREDICTO" WHICH MEANS TO SPEAK THE TRUTH. AND ONCE YOU HAVE REACHED A VERDICT TO WHICH YOU ALL TWELVE AGREE, THEN IT WILL SPEAK THE TRUTH OF YOU

COLLECTIVELY AS A JURY, AS WELL AS INDIVIDUALLY.

PLEASE RETIRE TO THE JURY ROOM. DO NOT BEGIN YOUR DELIBERATIONS UNTIL I INSTRUCT YOU TO DO SO. AND PLEASE STAND THE ALTERNATES ASIDE, GENTLEMEN.

THE BAILIFF: YES, SIR.

(JURY OUT.)

THE COURT: ANY EXCEPTIONS OR ADDITIONS FROM THE STATE?

THE SOLICITOR: NONE FROM THE STATE.

THE COURT: FROM THE DEFENSE?

MS. FULLWOOD: SIMPLY, MY EXCEPTION TO THE COURT'S FAILURE TO CHARGE MY REQUEST TO CHARGE NUMBER ONE AND IN THE ALTERNATIVE, MY REQUEST TO CHARGE TWO.

THE COURT: YES, MA'AM. SO NOTED FOR THE RECORD.

* * *

[2084] THE COURT: ALL RIGHT.

LET ME MAKE A FEW OTHER ANNOUNCEMENTS. FIRST OF ALL, TO THE LAWYERS INVOLVED IN THE CASE, CERTAINLY, I'VE ENJOYED TRYING THIS CASE WITH YOU. IT'S PRESENTED A LOT OF INTERESTING ISSUES.

* * *

(WHEREUPON, THE JURY BEGAN THEIR DELIBERATIONS AT 6:37 P.M.)

(RECESS.)

THE BAILIFF: COURT IS NOW IN SESSION.

[2085] **VERDICT**

* * *

THE COURT: THANK YOU.

YOU MAY BE SEATED.

LET ME ONCE AGAIN REMIND EVERYONE TO – IF YOU DO NOT FEEL THAT YOU CANNOT CONTROL YOUR EMOTIONS REGARDLESS OF THE VERDICT, PLEASE STEP OUTSIDE BECAUSE I WILL NOT TOLERATE ANY OUTBURST.

ALL RIGHT. BRING THE JURY BACK.

(WHEREUPON, THE JURY RETURNED TO THE COURTROOM AT 7:20 P.M.)

THE COURT: MR. FOREMAN, IT'S MY UNDERSTANDING THAT YOU HAVE REACHED A VERDICT TO WHICH YOU ALL TWELVE AGREE, IS THAT CORRECT?

THE FOREMAN: THAT'S CORRECT.

THE COURT: AND YOU HAVE FILLED OUT THE FORM AS I INSTRUCTED YOU?

THE FOREMAN: YES, SIR.

THE COURT: ALL RIGHT.

PLEASE HAND THEM TO THE BAILIFF.

(WHEREUPON, THE VERDICT FORMS ARE HANDED TO THE CLERK AT THIS TIME.)

THE COURT: ALL RIGHT, MR. CLERK. YOU MAY PUBLISH THE VERDICT.

COUNTY OF LEXINGTON, *STATE OF SOUTH CAROLINA VERSUS WILLIAM ARTHUR KELLY.*

WE, THE JURY, OF THE ABOVE-ENTITLED CASE, FIND [2086] BEYOND A REASONABLE DOUBT THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES

(1) KIDNAPPING;

(2) BURGLARY;

(3) ROBBERY WITH AN ARMED – WITH ARMED AND DEADLY WEAPON;

(4) LARCENY WITH THE USE OF A DEADLY WEAPON;

(5) COMMISSION OF PHYSICAL –

THE COURT: PHYSICAL TORTURE.

THE CLERK: PHYSICAL TORTURE.

FOREPERSON: COLIN BENNETT, EARL HARRISON, MATTHEW GARRISON, CHRISTINE REYNOLDS; TAMMY SMITH, TAMMY WOODS, MARVIN BRANHAM, TAMMY (SIC) GATES, EDWARD

JEFFCOAT, CLINE TAYLOR, JAMES KEISLER, MARY TERRY.

THE COUNTY OF LEXINGTON, *STATE OF SOUTH CAROLINA VERSUS WILLIAM ARTHUR KELLY.*

WE, THE JURY, IN THE ABOVE-ENTITLED CASE, HAVING FOUND BEYOND A REASONABLE DOUBT THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES, TO WIT:

KIDNAPPING;

BURGLARY;

ROBBERY WITH ARMED AND DEADLY WEAPON;

LARCENY [sic] THE USE OF DEADLY WEAPON;

COMMISSION OF PHYSICAL TORTURE.

NOW RECOMMEND THE COURT THAT THE DEFENDANT, [2087] WILLIAM ARTHUR KELLY, BE SENTENCED TO DEATH.

[2091] **MOTIONS**

* * *

THE COURT: ALL RIGHT.

ANY MOTIONS?

MS. FULLWOOD: YES, SIR. I HAVE TWO MOTIONS.

THE COURT: YES, MA'AM.

MS. FULLWOOD: YOUR HONOR, I WOULD MOVE AT THIS TIME THAT THE COURT SET ASIDE THE JURY'S VERDICT ON GROUNDS THAT IT WAS THE RESULT OF PASSION, PREJUDICE OR SOME OTHER ARBITRARY FACTOR.

IN THAT REGARD, YOUR HONOR, I WOULD POINT OUT THAT THE STATE WAS ABLE TO INTRODUCE OVER THE DEFENDANT'S OBJECTION EVIDENCE THAT THE VICTIM IN THIS CASE WAS PREGNANT. THE STATE WAS, NOT ONLY, PERMITTED TO PUT THAT INFORMATION INTO EVIDENCE, BUT THEY WERE PERMITTED OVER OUR OBJECTIONS TO ARGUE THE SAME TO THE JURY.

FURTHER, YOUR HONOR, THE STATE WAS ALLOWED TO PUT [2092] IN EVIDENCE FACTS WHICH WOULD TEND TO PROVE THAT THE DEFENDANT MIGHT BE DANGEROUS IN THE FUTURE. ON THE OTHER HAND, THE DEFENDANT WAS NOT ALLOWED AN INSTRUCTION TO REBUT THAT INFERENCE; THAT IS, THE INSTRUCTION THAT A LIFE SENTENCE FOR HIM WOULD ACTUALLY MEAN LIFE IN PRISON.

THE SOLICITOR GAVE A VERY IMPASSIONED CLOSING ARGUMENT. DURING THE ARGUMENT, THE VICTIM'S WIDOWER WAS ALLOWED TO SIT AT THE BENCH BEHIND THE SOLICITOR'S TABLE, VERY CLOSE TO THE TABLE, HIS GRIEF AND ANGUISH WAS QUITE APPARENT TO THE JURY AS HE WEPT LOUDLY DURING MR. MYERS' ARGUMENT. AND MR. MYERS MADE AN INFLAMMATORY ARGUMENT

WHICH AT TIMES WAS SUSTAINED BY YOUR HONOR AT OUR OBJECTION.

YOUR HONOR, THIS JURY WENT OUT I BELIEVE, AT 6:37. I THINK THAT'S THE OFFICIAL TIME. I KNOW FROM THE BAILIFFS AND ALL THAT THEIR FIRST ACTIVITY WAS TO GO OUTSIDE FOR A CIGARETTE BREAK, WHICH TOOK THEM SOME TIME, AND THEN THEY CAME BACK – WE GOT THE KNOCK AT THE DOOR AT ABOUT 7:20.

BASICALLY, YOUR HONOR, THEY DELIBERATED FOR ABOUT THIRTY MINUTES BEFORE THEY REACHED THIS SENTENCE.

ON THE OTHER HAND, THEY DELIBERATED FOR ALMOST AN HOUR TO DECIDE THAT HE WAS GUILTY OF ALL THESE CHARGES WHEN WE HAD CONCEDED GUILT. FROM THE OUTSET.

I THINK ALL THESE FACTORS SHOW THAT THIS WASN'T A [2093] REASONABLE DECISION, BUT IT WAS BASED ON PASSION AND PREJUDICE. SO WE THEREFORE ASK THAT YOU SET ASIDE THE VERDICT.

THE COURT: MS. FULLWOOD, I HAVE, OF COURSE, LISTENED VERY CAREFULLY TO ALL THE MOTIONS THAT HAVE BEEN MADE THROUGHOUT THE COURSE OF THE TRIAL AND RULED UPON THEM ACCORDINGLY. AND I HAVE FOUND NOTHING THAT I WOULD CHANGE TO IN ANY WAY INTERFERE WITH THE VERDICT THAT HAS BEEN REACHED BY THE JURY IN THIS CASE.

THE FACT THAT THEY HAVE BEEN HERE FOR THIS PERIOD OF TIME, ALL WEEK, LISTENED VERY CLOSELY TO THE TESTIMONY AND EVIDENCE PRESENTED BY THE STATE AS WELL AS THE DEFENSE LEADS ME TO BELIEVE THAT THEY HAVE BEEN VERY CONSCIENTIOUS IN LISTENING TO THESE MATTERS AND THE FACT THAT THEY HAVE COME TO A VERDICT IN APPROXIMATELY AN HOUR, IN NO WAY DO I FIND THAT THAT'S THE RESULT OF ANY TYPE OF PASSION, PREJUDICE OR ANY OTHER ARBITRARY FACTOR. AND SO GIVEN THE FACT OF MY RULINGS ON YOUR PREVIOUS MOTIONS, I THINK THROUGHOUT THE COURSE OF ANY OBJECTIONS THAT WERE MADE TO THE SOLICITOR'S ARGUMENT, THAT WHEN I SUSTAINED THEM, I TOLD THE JURY THAT THEY WERE TO DISREGARD THOSE AND NOT TO CONSIDER THEM, AND AS A RESULT, ALL MOTIONS ARE DENIED.

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

DEFENDANT'S REQUEST TO CHARGE NUMBER 1

96-GS-32-3226

[Caption Omitted In Printing]

I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

Authority: *S.C. Code Ann.* § 16-3-20 (Cum. Supp. 1997).

IN THE COURT OF GENERAL SESSIONS

DEFENDANT'S PROPOSED REQUESTS TO CHARGE

[Caption Omitted In Printing]

DEFENDANT'S PROPOSED INSTRUCTION NO.: 2

I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may **not** consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during your deliberations as to the sentence to be imposed.

At the same time, you should understand that your consideration of reasons *not* to impose the death penalty is *unlimited*. Thus, if you find from the evidence that the defendant's future behavior is likely to be good, that *would* be a proper factor for you to consider as a reason to sentence him to life imprisonment rather than the death penalty.

Supreme Court of South Carolina.

No. 25226.

[Caption Omitted In Printing]

Heard Sept. 20, 2000.
Decided Jan. 8, 2001.

Assistant Appellate Defender Robert M. Dudek of South Carolina Office of Appellate Defense, of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

WALLER, Justice.

A jury convicted appellant William Kelly of murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. Kelly was sentenced to death for murder, thirty years consecutive for armed robbery, and five years consecutive for possession of a knife during the commission of a violent crime. This case consolidates his direct appeal with the mandatory review provisions of S.C.Code Ann. § 16-3-25 (1985). We affirm.

FACTS

On the night of January 5, 1996, police officer Stephen Clare drove by the Batesburg KFC and noticed in the parking lot a car running with the driver's door open. Knowing that it was after the restaurant's usual closing

time and recognizing the car as belonging to Shirley Shealy, the manager of the KFC, Officer Clare pulled in to investigate. Officer Clare discovered Shealy's body in the KFC; her hands were taped behind her back, and money was strewn all over the floor and stuck to her bloody body.

Kelly, a former KFC employee, had visited the KFC earlier that day. After interviewing KFC employees, Batesburg-Leesville Chief of Police William Oswald attempted to locate Kelly. On January 8, 1996, Kelly's mother called Chief Oswald and told him that Kelly was in Lowell, Massachusetts. Lowell police detectives found Kelly at his sister's residence in Lowell. Kelly, who was seventeen years old at the time, was advised of his *Miranda*[1] rights and made a statement to the detectives admitting that he killed Shealy and stole money from the KFC. Kelly had in his possession money stained with Shealy's blood. In addition, the Lowell detectives retrieved Kelly's bloodstained clothing from his car.

Kelly was indicted for murder, kidnapping, armed robbery, and possession of a knife during the commission of a violent crime. At trial, the forensic pathologist who performed the autopsy testified that Shealy was stabbed thirty-one times and her neck was cut from ear to ear. She bled to death. At the time of her death, Shealy was 23 weeks pregnant. The jury convicted Kelly on all charges.

In the sentencing phase, the trial court instructed the jury on five statutory aggravating circumstances, to wit,

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

that the murder was committed while in the commission of: (1) kidnapping; (2) burglary; (3) robbery while armed with a deadly weapon; (4) larceny with use of a deadly weapon; and (5) physical torture. *See* S.C.Code Ann. § 16-3-20(C) (Supp.1999). The jury was charged on three statutory mitigating circumstances: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the age of the defendant at the time of the crime; and (3) the defendant was below the age of eighteen at the time of the crime. *Id.* The jury found all five aggravating circumstances and recommended the death penalty. Accordingly, the trial court imposed a sentence of death for the murder conviction.

ISSUES

1. Did the trial court err by refusing to redact from Kelly's statement references to Shealy's pregnancy?

2. Did the trial court err by refusing to charge the jury on parole ineligibility?

3. Did the trial court err by refusing to charge the jury that future dangerousness was not at issue?

4. Was the testimony of Matthew McCormack improperly bolstered by the State?

5. Did the trial court err by allowing testimony from Shealy's sister about statements made by Shealy's son?

1. FAILURE TO REDACT REFERENCES TO VICTIM'S PREGNANCY

Kelly raises only one issue regarding the guilt phase of his trial. He argues that the trial court erred by not redacting from his confession references to Shealy's pregnancy. We disagree.

Kelly gave the Lowell police a written statement which the State introduced at trial. In his statement, Kelly confessed to slitting Shealy's throat and stabbing her repeatedly. Basically, Kelly's explanation for why he killed Shealy was that his attack was in response to Shealy's request for sex. He stated that while he worked at the KFC, Shealy would "always" proposition him sexually. Kelly stated that on January 5, 1996, he went to the KFC after closing time and saw Shealy in the office. According to Kelly, Shealy again propositioned him for sex, grabbed him, and asked him not to leave. He stated that he duct-taped Shealy's hands behind her back so she would not touch him. Kelly said that as he went to leave, Shealy got her hands free, grabbed him and started hitting him. Kelly stated that he then took out his knife, slit her throat and continued to stab her while she kept grabbing at him. Kelly told the Lowell police that Shealy then fell to the floor and was gasping for air. To keep her from getting up, Kelly said that he again taped her hands behind her back.

Kelly made two references to Shealy's pregnancy in his statement. First, he stated that he "did know that Shirley was pregnant." Second, Kelly stated that Shealy asked him "to stay and have sex with her" and that she

told him "since she was pregnant already" he could not get her pregnant if they had sex.

At the outset of the guilt phase, Kelly moved to exclude any evidence that Shealy was pregnant. The State informed the trial court that it planned on introducing Kelly's statement which, as detailed above, included references to the pregnancy. Kelly then moved to redact those references. The trial court denied the motion. With the exception of Kelly's statement, the State did not introduce any evidence about Shealy's pregnancy during the guilt phase of the trial. Kelly presented no witnesses in his defense. At Kelly's request, the jury was instructed on voluntary manslaughter.

In the State's guilt phase closing argument, Shealy's pregnancy was mentioned twice without objection. The State argued that Kelly had "the perfect victim. He's got a pregnant lady. Is she going' to do what he says? Yes, ma'am. Yes, sir." The State noted the pathologist's testimony that there were no defensive wounds and no blood on Shealy's hands. The State therefore argued that Kelly's statement that Shealy's hands were free during the attack was not credible. Specifically, the State argued that if her hands were free, "What is she going to do? She's going to be covering up. She's going to be trying to avoid it. She's pregnant."

Kelly contends that the trial court should have redacted his statement to remove the references to Shealy's pregnancy because the evidence was not relevant, or, alternatively, the probative value of this evidence was outweighed by its unfairly prejudicial impact. We disagree.

Evidence is relevant and admissible if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rules 401, 402, SCRE. Nevertheless, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one. *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (citation omitted). The trial court is given broad discretion in ruling on questions concerning the relevancy of evidence, and its decision will be reversed only if there is a clear abuse of discretion. *Id.* at 380, 401 S.E.2d at 148.

The jury was instructed on both murder and voluntary manslaughter.[2] Thus, there was an issue on the presence or absence of malice. *See State v. Gandy*, 283 S.C. 571, 573, 324 S.E.2d 65, 66-67 (1984) (voluntary manslaughter is distinguished from murder because "the vital element of malice is missing") *implicitly overruled on other grounds by Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C.Code Ann. §§ 16-3-10, 16-3-50 (1985 & Supp.1999). " 'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing

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[2] Murder is "the killing of any person with malice aforethought, either express or implied." S.C.Code Ann. § 16-3-10 (1985). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. *E.g., State v. Johnson*, 333 S.C. 62, 508 S.E.2d 29 (1998); *see also* S.C.Code Ann. § 16-3-50 (1985) (manslaughter is "the unlawful killing of another without malice").

wrong." *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

We believe the evidence of Shealy's pregnancy was relevant to the issue of intent, i.e., whether Kelly acted with malice. The State's theory of the case was that Kelly planned his crimes.[3] Because Kelly knew Shealy was pregnant, and thus, particularly vulnerable, the jury could infer that Kelly had consciously selected a "perfect victim." Such evidence of planning certainly negates voluntary manslaughter which requires a showing of provocation. Additionally, although the evidence of Shealy's pregnancy came directly from Kelly's own statement, this evidence tended to refute Kelly's version of how the attack occurred. Therefore, Kelly's references to the pregnancy made it less probable that he committed voluntary manslaughter. *See* Rule 401, SCRE. Moreover, the fact that Kelly killed a pregnant woman, in our opinion, "indicates a wicked or depraved spirit intent on doing wrong." *State v. Kelsey, supra*. The evidence was, therefore, probative on the issue of whether Kelly acted with malice.

Kelly argues that this evidence undeniably had an emotional impact on the jury, and thus should have been excluded because it was unfairly prejudicial. As discussed above, the evidence was relevant to the only real issue in the guilt phase-the presence or absence of malice. Accordingly, we believe the probative value of the evidence outweighed its prejudicial effect. *Compare State v.*

[3] For example, the State established that the type of latex gloves and duct tape used in the attack were not used by the KFC and that they were used at the McDonald's where, at the time of his crimes, Kelly was working as a cook.

Garner, 304 S.C. 220, 403 S.E.2d 631 (1991) (prejudicial effect of evidence of other crimes outweighs its probative value when purpose for which it is admitted is *not* a contested issue) *with State v. Simmons*, 310 S.C. 439, 427 S.E.2d 175 (1993) (probative value of other-crimes evidence outweighed its prejudicial effect where the issue of intent was a contested one), *reversed on other grounds by Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).[4]

We hold that the trial court did not abuse its discretion in admitting evidence of Shealy's pregnancy in the guilt phase. *State v. Alexander, supra.* Accordingly, Kelly's convictions are affirmed.

2. REFUSAL TO GIVE PAROLE INELIGIBILITY INSTRUCTION

Kelly argues that the trial court erred in the sentencing phase when it refused to instruct the jury that he would be ineligible for parole if sentenced to life. Kelly contends that since the State presented evidence of Kelly's future dangerousness, due process and *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), required the parole ineligibility charge. We

[4] Additionally, we note that the manner in which the evidence was introduced minimized its prejudicial effect. The State did not elicit testimony about Shealy's pregnancy from any witness in the guilt phase. The only evidence admitted on the fact came in through Kelly's statement. Likewise, in the State's guilt phase closing argument, Shealy's pregnancy was mentioned only twice.

hold that *Simmons* does not apply to this case, and therefore, the trial court correctly declined to give the instruction.

In the sentencing phase, the State presented several witnesses who testified about Kelly's actions while he was incarcerated at the Lexington County Detention Center. The jail administrator testified that an attempted escape charge had been filed against Kelly because a mortar joint around a cinder block in his cell had been gouged out.[5] Matthew McCormack, who had twice been Kelly's cellmate at the jail, testified that he and Kelly often spoke of escaping and that Kelly had, at one point, taken action on an escape plan. McCormack stated that Kelly made a shank and planned to take a female correctional officer hostage. Although Kelly called the correctional officer to their cell, McCormack stated that Kelly backed out of going through with the plan. The State also questioned correctional officer Mark Wharton who testified that he discovered a shank in Kelly's possession. Finally, Edward Bryant, who had been in jail with Kelly, testified that he heard Kelly talk about escape. In addition, Bryant testified that Kelly bragged about his crime, requested that he be called "KFC," and walked around with a cup which had a drawing of a chicken with its head cut off and a knife on it.

At the conclusion of the sentencing phase, Kelly requested the following jury charge:

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[5] On cross-examination, Kelly emphasized he was only one of three inmates housed in that cell and it had not been proven he was the one who actually had dug out the mortar around the cinder block.

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

See S.C.Code Ann. § 16-3-20 (Supp.1999). The State objected to the charge and stated that because it was not going to argue future dangerousness, the charge was not required by *Simmons*. Ruling that the State's evidence went to Kelly's character and characteristics and not to future dangerousness, the trial court denied the request to charge.[6]

In closing argument, the State argued that the death penalty was "the punishment that fits the crime." The State argued that Kelly had planned his crime and that he was a "master murderer." Because Kelly had no prior record, the State argued that a person who commits "an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal. . . . You kind of trust them a little bit." Further, the State argued that Kelly was intelligent, quick-witted and did not have any mental illness. Thus, the State argued that made Kelly "a little more dangerous . . . for this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy." Finally, the State recounted, over objection, the evidence regarding Kelly's

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[6] The jury was given a plain meaning charge.

attempted escapes from jail and that he had a shank. The State then argued that "murderers will be murderers. And he is the cold-blooded one right over there."

On appeal, Kelly contends that: (1) the State's evidence about escape attempts, possession of a shank, and his behavior in jail raised the issue of future dangerousness; (2) the State argued future dangerousness in its closing; and therefore, (3) the trial court erred in refusing to charge the jury regarding Kelly's parole ineligibility. Kelly argues he was denied due process because the jury instruction was mandated by *Simmons*.

In *Simmons*, a plurality of the United States Supreme Court held that when a capital defendant would be ineligible for parole if sentenced to life in prison and the State argues the defendant's future dangerousness as a basis for imposing the death penalty, the defendant is entitled to have the jury informed of his parole ineligibility through either defense argument or instruction by the trial judge. *Simmons, supra.*[7] The *Simmons* Court explained that the "Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.' " *Id.* at 161, 114 S.Ct. at 2192, 129 L.Ed.2d at 141 (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d

[7] Shortly after *Simmons* was decided, this Court held that the trial judge *must* charge a capital defendant's parole ineligibility when future dangerousness is at issue and either the defendant requests such a charge or the jury inquires about the meaning of "life imprisonment." *State v. Southerland*, 316 S.C. 377, 387, 447 S.E.2d 862, 868 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1136, 130 L.Ed.2d 1096 (1995), *overruled on other grounds State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995).

393, 404 (1977)). Thus, the Court ruled that the "State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 171, 114 S.Ct. at 2198, 129 L.Ed.2d at 147.

To be entitled to a *Simmons* charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to death is life imprisonment without possibility of parole. *Id.* at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); *see also State v. McWee*, 322 S.C. 387, 391-92, 472 S.E.2d 235, 238 (1996), *cert. denied*, 519 U.S. 1061, 117 S.Ct. 695, 136 L.Ed.2d 618 (1997) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence"). Kelly has not met either prong of the *Simmons* test.

First, we agree with the trial court that the State's evidence at sentencing did not implicate future dangerousness. Evidence that Kelly took part in escape attempts and carried a shank simply is not the type of future dangerousness evidence contemplated by *Simmons*.[8] The underlying principle of the *Simmons* holding is that if evidence of future dangerousness is presented by the

[8] When the State argues future dangerousness, it "urge[s] the jury to sentence the defendant to death so that he will not be a danger to the public *if released* from prison." *Simmons*, 512 U.S. at 163, 114 S.Ct. at 2193, 129 L.Ed.2d at 142 (emphasis added).

State, the defendant must be allowed to *rebut* this evidence by showing that he will never be eligible for parole, i.e., that he will never *legally* be let out of prison. In the instant case, however, Kelly argues that the evidence he is an escape threat (and thus a risk to the general public) required that the jury be instructed on parole ineligibility. The flaw in Kelly's argument is that a *Simmons* charge would not rebut this evidence. Telling a jury that a convicted murderer will never be eligible for parole simply does not respond to the State's evidence that he presents an escape risk.

In our opinion, the evidence presented by the State in the penalty phase was designed to show that Kelly would not adapt to prison life because in jail he had been caught carrying a weapon and planning or participating in escape attempts. Kelly was allowed to rebut this evidence, through both cross-examination of the State's witnesses and the witnesses presented in his defense.[9] Thus, Kelly was given the opportunity to deny or explain the State's evidence, in accordance with due process requirements.

Kelly further contends that the State argued future dangerousness to the jury and thus misled the jury in violation of his due process rights. Specifically, Kelly

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[9] Kelly presented expert testimony from a clinical psychologist, Dr. Steven Shea, and a correctional management consultant, James Aiken. Dr. Shea testified that Kelly could adjust to prison. Aiken testified that Kelly could be "adequately managed, housed and secured without endangerment in a correctional facility within the South Carolina Department of Corrections."

argues that the State's argument that Kelly is worse than a serial killer and that "murderers will be murderers" constituted argument on future dangerousness. We disagree. A fair reading of the State's closing argument shows that the State consciously avoided any implication of future dangerousness. Not once did the State suggest to the jury that it should impose the death penalty because Kelly would be a future danger to the general public. *Cf. Simmons, supra* (where the Court found the following arguments to be generalized argument of future dangerousness: "what to do with [petitioner] now that he is in our midst" and that the death penalty would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense"). Instead, the State argued Kelly should be given the death penalty primarily as retribution for the heinous nature of the murder and because of the status of Shealy, the pregnant victim.

We hold that future dangerousness was not an issue in this case. It was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument.

Additionally, the second prong of the *Simmons* test was not met. The *Simmons* rule is applicable when the only alternative to a death sentence is life imprisonment without parole. *See Simmons*, 512 U.S. at 178, 114 S.Ct. at 2201, 129 L.Ed.2d at 151 (O'Connor, J., concurring); *State v. McWee*, 322 S.C. at 391-92, 472 S.E.2d at 238. Because Kelly was tried under the new sentencing scheme which became effective on January 1, 1996, he could have been sentenced to either (1) death; (2) life without the possibility of parole; or (3) a mandatory minimum thirty year

sentence. *See* S.C.Code Ann. § 16-3-20 (Supp.1999). The mandatory minimum sentence of thirty years is available only if the jury returns with no finding of aggravating circumstances. *Id.*

This Court recently held that *Simmons* is inapplicable under the new sentencing scheme because life without the possibility of parole is not the only legally available sentence alternative to death. *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000); *State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000), *cert. granted*, ___ U.S. ___, 121 S.Ct. 30, 147 L.Ed.2d 1053 (2000). The logic behind this holding is that a *Simmons* charge is designed to answer the State's evidence that the defendant will be a future danger to society by telling the jury that if sentenced to life in prison, the defendant will never be paroled. In other words, a *Simmons* charge informs the jury that by rejecting the death penalty, the defendant will spend the rest of his natural life in prison. However, if another sentence other than life without parole is available to the defendant as an alternative to the death penalty, then a *Simmons* charge would actually mislead the jury by representing that the defendant would never be released from prison, when in fact, a thirty-year sentence is a potential sentence for the defendant. *See Starnes*, 340 S.C. at 329, 531 S.E.2d at 916 ("Contrary to a sentence of life imprisonment without parole, a mandatory minimum thirty year sentence does not rebut the State's argument regarding the defendant's threat to society."). Accordingly, *Simmons* should not, and does not, apply when *as a*

matter of law another sentence other than death or life without parole is available to a capital defendant.[10]

Nonetheless, Kelly contends that the thirty-year minimum sentence was not available to him because the jury would have violated its oath if it had not found at least one aggravating circumstance. Thus, Kelly argues that *Simmons* applies to the instant case. In *Starnes*, however, we stated that it is "inappropriate to assume the jury will find a statutory aggravating circumstance." *Id.* at 330, 531 S.E.2d at 917. Although we granted Kelly's motion to argue against the recent precedent set in *Starnes* and *Shafer*, we adhere to that precedent and hold it is not appropriate to presume that in certain cases a jury will always find particular statutory aggravating circumstances. *Cf. State v. Riddle*, 301 S.C. 68, 71, 389 S.E.2d 665, 667 (1990) (where this Court found error in submitting to resentencing jury convictions from previous trial as evidence of aggravating circumstances; the Court stated that the convictions from the guilt phase were not "binding upon the resentencing jury" as it was the sentencing "jury's responsibility to find the existence, *or not*, of a

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[10] We note that the second prong of the *Simmons* test may be satisfied under certain circumstances. For example, if the recidivist statute is applied, there will be no third alternative sentence as a matter of law. *See* S.C.Code Ann. § 17-25-45 (Supp.1999) (imposing mandatory sentence of life imprisonment without parole where defendant has prior convictions of a most serious nature). If section 17-25-45 is invoked and future dangerousness is argued, *Simmons* is applicable because the only available sentences are life without parole or death. In the instant case, however, Kelly had no previous convictions, and therefore, section 17-25-45 does not affect our analysis of this issue.

statutory aggravating circumstance") (emphasis added). Therefore, Kelly cannot satisfy the second prong of the *Simmons* test.

We hold the trial court correctly refused to give the jury a *Simmons* charge.[11]

3. REFUSAL TO CHARGE THAT FUTURE DANGEROUSNESS WAS NOT AT ISSUE

After his request on the parole ineligibility charge was denied, Kelly requested the following jury charge:

> I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may not consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during you deliberations as to the sentence to be imposed.
>
> At the same time, you should understand that your consideration of reasons not to impose the death penalty is unlimited. Thus, if you find from the evidence that the defendant's future behavior is likely to be good, that would be a proper factor for you to consider as a reason to sentence him to life imprisonment rather than the death penalty.

Because the State agreed not to argue future dangerousness, Kelly maintains that the trial court erred in failing to give the charge. We disagree.

"The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). The law to be charged to the jury is determined by the evidence presented at trial. *E.g., State v. Lee*, 298 S.C. 362, 380 S.E.2d 834 (1989). Furthermore, a trial court should not give jury instructions which do not fit the facts of the case as such charges may tend to confuse the jury. *Id.; see also*

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[11] Kelly also contends that the requested instruction was required because of James Aiken's testimony regarding good time credits. Aiken, Kelly's expert witness on prison management, testified on direct examination that prisoners may be sanctioned for disciplinary infractions by "taking good time away." On cross-examination, the State questioned Aiken further, and Aiken stated that he was speaking hypothetically, not about this particular case. Kelly argues that the testimony about good time credits raised the inference that he would be released from prison, and therefore, he should have been able to rebut the evidence with the parole ineligibility charge. We believe Kelly's contention is without merit. Aiken's testimony merely discussed, in general terms, internal prison procedures for dealing with disciplinary violations committed by inmates. Kelly was not denied the opportunity to rebut this evidence; therefore, his due process rights were not compromised. Moreover, we note his own counsel elicited this testimony on direct examination. *State v. Washington*, 315 S.C. 108, 110, 432 S.E.2d 448, 449 (1992) (appellant may not complain about the admission of evidence elicited by his own counsel).

State v. Leonard, supra (a trial court commits error when it provides instructions which are calculated to confuse or mislead the jury).

We hold that the trial court correctly denied the requested charge because the evidence did not support the charge as written. The State is permitted to argue that a capital defendant might pose a future danger to those within prison. This type of evidence and argument is distinguishable from what is considered "future dangerousness" under *Simmons*, i.e., a future danger to society. *Cf. State v. Rogers*, 320 S.C. 520, 466 S.E.2d 360 (1996) (where the Court indicated that if prosecution had argued only that defendant posed a danger to other prison inmates, and had not included danger to society argument, then *Simmons* would not apply); *Allridge v. Scott*, 41 F.3d 213 (5th Cir.1994), *cert. denied*, 514 U.S. 1108, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995) (where the court noted that *Simmons* is inapplicable where the State argues that the defendant poses a danger to everybody, including fellow inmates) (citing *Simmons*, 512 U.S. at 165 n. 5, 114 S.Ct. at 2194 n. 5). Therefore, the requested charge was clearly incorrect because it instructed the jury "there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment." This charge thus would have precluded the jury from considering evidence of Kelly's future danger to others within prison, evidence which was clearly presented by the State and appropriate for the jury to consider.

Moreover, the charge as written is extremely confusing. It simply would not have aided the jury in making its sentencing determination. *State v. Leonard, supra.*

Accordingly, the trial court did not err by denying this request to charge.

4. BOLSTERING OF STATE'S WITNESS

Kelly argues that the State improperly bolstered Matthew McCormack's testimony thereby impermissibly vouching for McCormack's credibility. We agree.

As recounted above in Issue 2, McCormack had been Kelly's cellmate. McCormack testified about Kelly making a shank and how he said he was going to use it to abduct a female correctional officer. In addition, McCormack testified that Kelly had frequently spoken about his crimes. McCormack stated that Kelly told him that he and Shealy had planned to rob the KFC but that Shealy had turned on him during the robbery. McCormack testified that Kelly told him that he came up behind Shealy and cut her throat and had tried to decapitate her.

Toward the end of McCormack's direct examination, the following colloquy took place:

> [Assistant Solicitor]: What did I tell you that I absolutely required regarding your testimony to this jury today?
>
> [McCormack]: Uh – excuse me?
>
> [Assistant Solicitor]: Did I tell you to tell the truth to this jury –
>
> [McCormack]: Of course.

At that point, Kelly objected on the grounds that the assistant solicitor was bolstering the witness's testimony and was making himself a witness. After the trial court overruled the objection, the assistant solicitor continued:

> [Assistant Solicitor]: What did I tell you regarding your testimony to this jury today? The only thing the State wanted from your testimony was what?
>
> [McCormack]: The truth.

On cross-examination, Kelly questioned McCormack about his prior criminal record which included grand larceny, burglary and forgery convictions. Kelly also elicited testimony from McCormack, who was a federal inmate, regarding how in the federal system an inmate could get a sentence reduction if he provides helpful testimony to the government. McCormack acknowledged that the potential for a sentence reduction was "one of [his] main reasons for" testifying against Kelly.

Kelly argues that the State's questioning impermissibly bolstered McCormack's credibility because it placed the prestige of the government behind McCormack, a jailhouse informant. Kelly also maintains that the assistant solicitor effectively became a witness in the case and vouched for McCormack's credibility.

In *United States v. Walker*, 155 F.3d 180 (3d Cir.1998), the Court of Appeals for the Third Circuit discussed generally the concept of vouching:

> Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 184 (citations omitted).

Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument. *See id.* at 185-87 (discussion of Third Circuit case law on vouching). In the instant case, however, Kelly's argument is targeted at the State's questioning of McCormack. At least one court has held that this type of questioning is improper. *See Mitchell v. State*, 549 P.2d 96 (Okla.App.1976) (where the prosecutor asked witness whether they had "talked about this case" and witness responded "Yes, sir. You instructed me to tell the truth," the court found improper bolstering).

In our opinion, the State's questions served to improperly bolster McCormack's credibility. *Id.* Although perhaps not technically vouching, the manner of questioning[12] by the State raises the second concern outlined

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[12] Although the assistant solicitor did not comment that he had personal knowledge McCormack was telling the truth or had outside evidence indicating the truthfulness of McCormack's testimony, the assistant solicitor improperly phrased his questions in the first person. ("What did *I* tell you *that I absolutely required* regarding your testimony to this jury today?" and "Did *I* tell you to tell the truth to this jury?") (emphasis added).

by the *Walker* court: the jury could have perceived that the assistant solicitor held the opinion that McCormack was, in fact, telling the truth. Thus, McCormack's testimony carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about McCormack. Because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility. Accordingly, the trial court erred in overruling Kelly's objection.

Nevertheless, we believe that this error was harmless beyond a reasonable doubt. *See State v. Gaskins*, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (erroneous admission of evidence in sentencing phase reviewed for harmless error), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985), *overruled in part on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In our opinion, Kelly's cross-examination effectively impeached McCormack's credibility by eliciting information about his motive for testifying. Moreover, given the overwhelming evidence of aggravation in this case, we do not believe that the State's bolstering of McCormack materially influenced the jury's decision to impose the death penalty.

Accordingly, because the error was harmless, Kelly is not entitled to resentencing on this issue.

5. TESTIMONY FROM VICTIM'S SISTER

Kelly argues that the trial court erroneously admitted hearsay testimony from Shealy's sister Cynthia Slade. We disagree.

During the sentencing phase, the State called Slade who presented victim impact testimony. The State questioned Slade about Shealy's son Alex, who was six years old when Shealy was killed:

> [Solicitor]: Have you seen Alex since his mother was murdered?
>
> [Slade]: Yes, sir.
>
> [Solicitor]: Has there been a change in him?
>
> [Slade]: Oh, yeah.
>
> [Solicitor]: Does he talk about it?
>
> [Slade]: Yeah. He talks about it a lot [sic]. We were at a wedding and he told basically everybody –

Kelly's attorney objected on the basis of hearsay. The trial court overruled the objection. When the State asked what Alex had said, Slade responded:

> He told everybody in the – at the wedding that a bad man had killed his mommy.

Kelly argues Slade's testimony that Alex said "a bad man had killed his mommy" was impermissible hearsay and should have been excluded.

The South Carolina Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence

to prove the truth of the matter asserted." Rule 801(c), SCRE. By that definition, we believe Slade's testimony was not hearsay because it was not offered to prove the truth of the matter asserted. That is, the evidence was not introduced to prove that a bad man killed Shealy. Instead, the testimony clearly was offered to show the impact the murder had on Shealy's young child and the rest of her family. As such, it was properly offered as victim impact evidence. *See, e.g., State v. Byram,* 326 S.C. 107, 485 S.E.2d 360 (1997) (victim's sister's testimony about the effect of the victim's death upon herself and the victim's three children was relevant for the jury to meaningfully assess appellant's moral culpability and blameworthiness).

Accordingly, the trial court correctly allowed this evidence to be admitted.

Kelly's remaining issue[13] is affirmed pursuant to Rule 220(b)(2) and the following authorities: *State v. Johnson,* 338 S.C. 114, 525 S.E.2d 519, *cert. denied,* ___ U.S. ___, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000) (autopsy photograph may be relevant to showing physical torture); *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998) (the determination of the relevancy, materiality, and admissibility of a photograph is left to the sound discretion of the trial judge); *State v. Kornahrens,* 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied,* 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781

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[13] Kelly argues that the trial court erred in admitting two of the State's photographic exhibits. As to Exhibit 116, an autopsy photograph, we note Kelly maintains that the exhibit "shows the fetus in the decedent's stomach." On the contrary, it is clear from both the photograph and the testimony at trial that this exhibit depicts Shealy's gaping neck wound.

(1987) (photographs which depict the bodies of the murder victims in substantially the same condition in which the defendant left them are admissible in sentencing phase of capital trial).

CONCLUSION

Kelly's convictions and sentences are affirmed. We have conducted the proportionality review required by S.C.Code Ann. § 16-3-25(C) (1985). The death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Hicks,* 330 S.C. 207, 499 S.E.2d 209, *cert. denied,* 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998); *State v. Powers,* 331 S.C. 37, 501 S.E.2d 116, *cert. denied,* 525 U.S. 1043, 119 S.Ct. 597, 142 L.Ed.2d 539 (1998).

AFFIRMED.

TOAL, C.J., MOORE and BURNETT, JJ., concur.

PLEICONES, J., dissenting and concurring in part in a separate opinion.

PLEICONES, Justice, dissenting and concurring.

I concur in the majority opinion with the exception of that portion which affirms the trial judge's refusal to give the requested parole ineligibility instruction. I would, therefore, affirm the convictions of the appellant, and reverse and remand for a new sentencing proceeding. It is my view that a *per se* rule should be adopted, requiring that, when requested, a parole ineligibility instruction be given to the jury deciding sentencing in a capital case.

In this case, appellant requested the following charge at the end of the sentencing phase:

> I charge you that the term "life imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

The majority affirms the trial judge's denial of this legally correct charge which is taken virtually verbatim from S.C.Code Ann. § 16-3-20(A) (Supp.1999). The majority relies upon our decisions in *State v. Starnes*, 340 S.C. 312, 531 S.E.2d 907 (2000), and *State v. Shafer*, 340 S.C. 291, 531 S.E.2d 524 (2000),[1] which hold that most capital defendants in South Carolina are no longer entitled to a parole ineligibility charge under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). Under *State v. Starnes, supra*, and *State v. Shafer, supra*, *Simmons* did not apply because appellant would not necessarily have received a sentence of life imprisonment had the jury failed to find a statutory aggravating circumstance.[2] Appellant, as the majority points out, could have

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[1] Appellant was granted permission to argue against these precedents. The United States Supreme Court has granted certiorari in *Shafer, supra*, ___ U.S. ___, 121 S.Ct. 30, 147 L.Ed.2d 1053 (2000).

[2] Appellant had no previous convictions of either "serious" or "most serious" offenses. *See* S.C.Code Ann. § 17-25-45 (Supp.1999) (defining these offenses).

received a mandatory minimum sentence of at least thirty years without the possibility of parole.

Further, the majority adheres to this Court's recent ruling in *State v. Starnes, supra*, that it is inappropriate to presume that juries will always find the existence of aggravating circumstance.

I propose a rule that is not dependent upon the shifting grounds of constitutional interpretation, is simple to apply, and has the result of fully informing the jury of its options. We have taken great pains to advise the jury that it is the final sentencing authority in a capital case.[3] That being the case, the jury should be equipped with the same knowledge in terms of sentencing as a sentencing judge. In my opinion, we should take this opportunity to clarify and simplify the rule for charging capital juries on the defendant's ineligibility for parole or early release.

Under our current capital sentencing scheme, if the defendant has been previously convicted of a "serious" or "most serious" offense[4] he faces only two possible sentences: death, or life imprisonment without possibility of parole. S.C.Code Ann. § 17-25-45 (Supp.1999).

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[3] A trial judge must, of course, still make an affirmative finding that the death penalty was warranted under the evidence, and that it was not the result of passion, prejudice, caprice, or any other arbitrary factor. S.C.Code Ann. § 16-3-20(C)(b) (Supp.1999).

[4] S.C.Code Ann. § 17-25-45(C)(1) and (2) (Supp.1999).

If the defendant has not been previously convicted of a "serious" or "most serious" offense, the potential sentences depend upon the jury's finding of at least one statutory aggravating circumstance. If the jury finds a statutory aggravating circumstance, the only sentencing choice to be made is whether to impose the death penalty or life imprisonment without possibility of parole. Should the jury fail to find the existence of a statutory aggravating circumstance, the sentence rests in the discretion of the trial judge. Her choices are life imprisonment, or a mandatory minimum term of at least thirty years. The defendant is parole ineligible in either circumstance.[5]

In my opinion, the unique circumstances of a capital case require that the sentencing authority – whether judge or jury – be fully informed with regard to sentencing options, including the convicted offender's parole ineligibility.

I would hold that where requested by the defense, a properly phrased parole ineligibility charge must be given to the jury in a capital case.

The jury would be instructed that should they find the existence, beyond a reasonable doubt, of one of more aggravating circumstances, there would be but two potential punishments: life imprisonment or the death penalty. The jury would further be informed that life imprisonment means until death, and that the defendant would be ineligible for parole or other early release. This is the charge requested by appellant here.

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[5] § 16-3-20(A) and (C)(b) (Supp.1999).

The jury would also be informed that should it fail to find the existence, beyond a reasonable doubt, of at least one statutory aggravating circumstance, the punishment would be solely within the province of the trial judge. The jury would be told that the sentencing options would be limited to life imprisonment without the possibility of parole, or, assuming the defendant were a non-recidivist, a mandatory minimum of at least thirty years, also without the possibility of parole.

I agree with Justice Blackmun's plurality opinion in *Simmons v. South Carolina, supra,* wherein he discussed the perceptions of most jurors regarding parole:

> It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States . . . . An instruction directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment'. *Id.* at 169-70, 114 S.Ct. at 2197, 129 L.Ed.2d at 146. The *Simmons* plurality noted that, at the time it was decided, twenty-six states empowered juries in capital sentencing and provided for life imprisonment without parole as an alternative punishment. Of those states, seventeen required that the jury be expressly informed of the defendant's parole ineligibility. *See id.* at n. 7. The Commonwealth of Virginia recently joined that number with its Supreme Court's decision in *Yarbrough v. Commonwealth,* 258 Va. 347, 519 S.E.2d 602 (1999). In my opinion, this State should likewise adopt the practice.

In its search for an appropriate sentence, the jury should have the benefit of clear and accurate instructions regarding its options. A "plain meaning" instruction does not adequately inform the jury. Without the knowledge that, if aggravators are found, a life sentence is not subject to being reduced by parole, or any other method of early release, the jury is likely to speculate unnecessarily on the possibility of early release, and impose a sentence of death based upon "fear rather than reason." *Yarbrough v. Commonwealth, supra, citing Farris v. Commonwealth,* 209 Va. 305, 307, 163 S.E.2d 575, 576 (1968). A parole ineligibility charge would eliminate any speculation. Since such a charge was not given in this case despite appellant's request, I would reverse the sentence and remand for a new sentencing proceeding.

The Supreme Court of South Carolina

[Caption Omitted In Printing]

ORDER

This Court affirmed petitioner's conviction and death sentence on direct appeal. *State v. Kelly,* Op. No. 25226 (S.C. Sup. Ct. filed January 8, 2001) (Shearouse Adv. Sh. No. 1 at 13). Petitioner now asks this Court to stay his execution while he seeks a writ of certiorari from the United States Supreme Court.

Petitioner's request for a stay of execution is granted. This stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases,* 321 S.C. 544, 471 S.E.2d 140 (1996).

IT IS SO ORDERED.

/s/ [Illegible] C.J.

/s/ [Illegible] J.

/s/ [Illegible] J.

/s/ [Illegible] J.

/s/ [Illegible] J.

Columbia, South Carolina

February 7, 2001

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 25, 2001

Mr. David I. Bruck
P.O. Box 11744
Columbia, SC 29211

Re: William Arthur Kelly
v. South Carolina
No. 00-9280

Dear Mr. Bruck:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

AUG 20 2001 (7)

Supreme Court, U.S.
FILED
AUG 20 2001
OFFICE OF THE CLERK

No. 00-9280

In The

Supreme Court of the United States

WILLIAM ARTHUR KELLY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the South Carolina courts' refusal to inform petitioner's sentencing jury that he would never be eligible for parole if the jury sentenced him to life imprisonment rather than to death violated *Simmons v. South Carolina,* 512 U.S. 154 (1994).

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The opinion of the South Carolina Supreme Court affirming petitioner's conviction and death sentence is reported as *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001), and is reprinted in the Joint Appendix at pages 313-343.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 8, 2001. The petition for writ of certiorari was filed on April 5, 2001, and granted on June 25, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part, "[N]or shall any state deprive any person of life . . . without due process of law. . . . "

2. It also involves S.C. Code Ann. §§ 16-3-10 *et seq.* (2000 Cum. Supp.), which code sections are reprinted in the Appendix to this brief at pages A-1 to A-5.

STATEMENT OF FACTS

On January 1, 1996, a South Carolina statutory amendment took effect that abolished parole or other forms of early release for all prisoners convicted of murder. No. 83, § 10, 1995 S.C. Acts 557, codified as S.C. Code § 16-3-20 (Supp. 2000), App. 1-2. In capital cases, the same legislation limited the sentencing jury's options to death and life imprisonment without possibility of parole, so long as the jury determined the defendant to be death-eligible by finding the existence of one or more statutory aggravating circumstances. *Id.*[1]

Just five days after the no-parole amendment took effect, 17-year-old William Arthur Kelly killed a former co-worker at a Kentucky Fried Chicken restaurant during the course of a robbery. He confessed to the crime, and was duly indicted in a South Carolina state court for murder, kidnaping, armed robbery, and possession of a knife during the commission of a violent crime. The facts of the offense involve the gruesome stabbing of a pregnant victim, and were summarized by the South Carolina Supreme Court as follows:

> On the night of January 5, 1996, police officer Stephen Clare drove by the Batesburg KFC and noticed in the parking lot a car running with the driver's door open. Knowing that it was after the restaurant's usual closing time and recognizing the car as belonging to Shirley Shealy, the manager of the KFC, Officer Clare

[1] This Court recently considered these amendments to the South Carolina capital sentencing scheme in *Shafer v. South Carolina*, 532 U.S. ___, 121 S. Ct. 1263 (2001).

> pulled in to investigate. Officer Clare discovered Shealy's body in the KFC; her hands were taped behind her back, and money was strewn all over the floor and stuck to her bloody body.
>
> Kelly, a former KFC employee, had visited the KFC earlier that day. After interviewing KFC employees, Batesburg-Leesville Chief of Police William Oswald attempted to locate Kelly. On January 8, 1996, Kelly's mother called Chief Oswald and told him that Kelly was in Lowell, Massachusetts. Lowell police detectives found Kelly at his sister's residence in Lowell. Kelly, who was seventeen years old at the time, was advised of his *Miranda* rights and made a statement to the detectives admitting that he killed Shealy and stole money from the KFC. Kelly had in his possession money stained with Shealy's blood. In addition, the Lowell detectives retrieved Kelly's bloodstained clothing from his car.

At trial, defense counsel virtually conceded petitioner's guilt from the outset, informing the jury in his opening statement that the primary issue for the jury's consideration would be whether to impose the death penalty. R. 1255-56. The state did offer a custodial confession in which petitioner made the highly improbable claim that the victim had provoked the killing by making sexual advances, JA 19-25; although the trial judge found that assertion sufficient to warrant a jury instruction on the lesser-included offense of voluntary manslaughter, neither petitioner nor his counsel pursued this claim at trial. For its part, the state's guilt phase presentation emphasized the extreme violence of the crime ("He cut her on the side of the neck. He cut her from the top of her

head down to her back. . . . He cut her in her neck, cut under her breasts, on the side and just ripped her . . . everywhere imaginable. That's what he did."), and promised to prove that petitioner "butchered her like an animal . . . for what he values more than common decency . . . more than human life, the lust for money." JA 10, 15-16. Following through on this promise, the state presented detailed testimony from a crime-scene technician and a pathologist describing the gory aftermath of the many knife wounds that petitioner admitted to having inflicted. JA 27-33. In his closing argument, the prosecutor stressed the premeditated nature of the murder, and reminded the jury of its brutality: "William Arthur Kelly . . . repeatedly, brutally stabbed her, cut her, slit her throat, put a hatchet-like wound in her head, cut her up like a piece of meat and left her there to die." JA 60. In response, defense counsel effectively conceded petitioner's guilt of murder, and admitted that "nobody would believe all of [his] statement." R. 1612. The jury deliberated only 65 minutes before convicting petitioner of all four counts in the indictment. R. 1638-40.

The prosecutor began the capital sentencing hearing that followed by describing petitioner as "a cold-blooded conniving, calculated murderer," and expressing the hope that the members of the jury would "never in your lives have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." JA 64. After informing the jury that "we are going to be vigorously seeking the death penalty and folks, we expect the death penalty," JA 68, the prosecutor re-offered in aggravation of punishment all of the evidence previously adduced at the guilt-or-innocence phase of the

trial. R. 1661. Next, the prosecution called a series of correctional officers and one of petitioner's former cell-mates to establish that petitioner was a dangerous and remorseless prisoner who posed a high risk of escape. By these witnesses' testimony, the state sought to prove the following facts:

- while awaiting trial on the present charges, petitioner angrily refused an order to go into his cell, and backup correctional officers had to be summoned to force him back into his cell, JA 73;
- petitioner was charged with attempting to escape after it was learned that the mortar around a cinder block in his cell had been scraped away, JA 81-83, 93-102, 105-110;
- on at least five occasions, petitioner had talked with a former cell-mate about escaping from jail, JA 128;
- petitioner had on more than one occasion made a "shank," a sharp knife-like tool, which is commonly used as a weapon in jail, JA 129-130, JA 139-141;
- petitioner had devised a plan to take a correctional officer hostage with a shank, and had gone so far as to call the correctional officer to his cell while he held a shank behind his back, JA 129-132, 146-147;
- petitioner behaved in a confrontational and aggressive manner around other inmates, JA 147, and
- petitioner joked and bragged to other jail inmates about the murder, asked to be nicknamed "KFC," and drew a grisly cartoon about the crime. JA 147-149.

Following this testimony, the state offered additional photographs, bloodstained clothing and medical testimony concerning the extremely violent and gruesome manner in which petitioner killed the victim. JA 151-178.

Responding to a defense objection to the photos and clothing, the prosecutor said that he was offering them both to establish the statutory aggravating circumstance of physical torture, and to show "the character and characteristics of the defendant." JA 151-55.[2]

After completing its own presentation, the prosecution elicited the following additional facts through cross-examination of a defense psychologist:

- petitioner told a mental health counselor that he "obsesses" about killing people who anger him, and about how he could do it without being caught, JA 195;
- petitioner was part of a prison gang, JA 206-208, and
- petitioner tortured and killed small animals while he was growing up. JA 218-219.

Cross-examining a former state prison official called by the defense, the prosecutor also highlighted the witness's passing reference to loss of "good-time" as a means of controlling prisoners, despite petitioner's objection that the state was trying to mislead the jury by falsely suggesting that a life sentence could be shortened by good-time credit. JA 229-237.

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[2] The state alleged a total of five statutory aggravating circumstances – kidnaping, burglary, armed robbery, larceny with use of a deadly weapon, and physical torture. South Carolina's capital sentencing scheme, which closely resembles the Georgia system upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976), also allows the jury to consider a wide array of nonstatutory aggravating factors (such as future dangerousness) as reasons to impose the death penalty once a finding of one or more statutory factors has rendered the defendant death-eligible. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994).

During the charge conference just before closing arguments, JA 243-254, petitioner's counsel requested, on the authority of *Simmons v. South Carolina*, 512 U.S. 154 (1994), that the judge read to the jury the following portion of S.C. Code Ann. § 16-3-20(A):

> "[L]ife imprisonment" means imprisonment until the death of the offender. No person sentenced to life imprisonment is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by law.

Defendant's Request to Charge Number 1, JA 311, 322, 540 S.E.2d at 856. At this point, the trial judge became aware, apparently for the first time, that petitioner's crime occurred after the effective date of South Carolina's abolition of parole for convicted murderers, and that the jury's life imprisonment option therefore meant life without possibility of parole. JA 243-244. However, the prosecutor responded that petitioner's parole-ineligibility was "immaterial," asserting that petitioner was not entitled to a *Simmons* instruction on parole ineligibility because the prosecutor was "not going to argue future dangerous[ness]" in his penalty phase summation. JA 245. Defense counsel protested that "the state has already raised future dangerousness . . . in its case in chief" by presenting evidence of petitioner's escape attempts, his possession of a shank in jail, and his plotting to take a female jail guard hostage. She continued,

> The clear inference that they seek for the jury to derive from this evidence is that he has a violent

> character. He is going to be dangerous in the future. That is a part of his character. . . . They also raise those inferences through their cross-examination of our expert witnesses as to those matters contained in the jail records. Future dangerousness has already been put at issue by the state itself in its case in chief.

JA 245-246. The prosecutor responded,

> I can't understand how past conduct somehow throws it into the future. We are talking about his past background, conduct, character. I am not going to talk about this defendant posing a future danger to the public and to society. . . . I didn't put up any psychiatrist or psychologist that said this man will kill again in the future.

JA 246. After considering the matter during a recess, the trial judge agreed with the state, ruling as follows:

> The argument that [defense counsel] make concerning the defendant's request to charge number one . . . you made the argument that the state has made future dangerousness an issue in this matter. I don't believe that the issues that have been presented by the state insofar as the testimony from the prison guards et cetera are such that causes this court to determine that future dangerousness has been made an issue. I think those are issues that go to the defendant's character and characteristics. As a result, I'm going to deny defendant's request for charge number one.

JA 249.

Defense counsel next requested, based on the court's finding that the state had not made an issue of petitioner's future dangerousness, that the court so instruct

the sentencing jury. Specifically, counsel requested an instruction that included the following:

> I have instructed you on the "aggravating" factors that you may consider as reasons to impose the death penalty. I tell you now that you may not consider, as a reason to impose the death penalty, any possibility that the defendant may be dangerous in the future unless he is executed. In this case, there is no evidence that the defendant will be dangerous if he does not receive the death penalty but is instead sentenced to life imprisonment. The state does not contend that he will be dangerous in the future. Therefore, any consideration about future dangerousness is not a legal factor for you to consider as a reason to sentence the defendant to death. This subject may not be considered by you at all in deciding whether the death penalty should be imposed, and should not even be mentioned by you during your deliberations as to the sentence to be imposed.

Defendant's Proposed Instruction No. 2, JA 312, 329-330, 540 S.E.2d at 859. The state opposed this instruction, and despite defense counsel's urging that the jury would infer petitioner's future dangerousness "from the evidence that the state itself put before the jury" absent such an instruction, the trial judge refused to give it. JA 251.

The prosecutor then delivered his summation. Notwithstanding his assurance that the state would not "argue" petitioner's future dangerousness, he proceeded to characterize petitioner as more frightening than a

serial killer, JA 260, as a butcher, and as "Billy the Kid."[3] JA 267-268. In an effort to minimize the significance of the fact that petitioner was only 17 and had no prior criminal record, the prosecutor argued, "You know something, a person that commits an uncharacteristic and an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal." JA 260. The prosecutor informed the jury that petitioner's murderousness was an innate and immutable fact: "He was going to kill. It was just a matter of when. Whether he was 17, 27, or 37." JA 261. Later in his closing, the prosecutor repeatedly referred to petitioner as "Bloody Billy, the butcher of Batesburg." JA 267. He went on to explain what made petitioner so dangerous: "What did his own witness say[?] He doesn't have any mental illness. He's intelligent. He's not retarded. He's quick-witted. Doesn't that make somebody a little more dangerous . . . ". JA 269. Petitioner's counsel promptly objected, telling the judge that the prosecutor had "stipulated dangerousness is not an issue," whereupon the prosecutor changed course to suggest that the dangerousness he had just referred to was " . . . for this lady, this crime on January 5th, doesn't that make him more unpredictable for Shirley Shealy. When you let your guard down and they stab you in the back. That's what

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[3] *See* Robert M. Utley, *Billy the Kid: A Short and Violent Life* (1989). Henry Antrim, also known as Billy the Kid, was a notorious Western outlaw and gang leader known for his boyish appearance and extreme ruthlessness. He killed his first victim when he was seventeen, *id.* at 12-14, and eventually murdered at least nine people before being gunned down himself at the age of twenty-one. *Id.* at 203-04.

we have here." JA 269. The prosecutor reminded the jury of petitioner's attempted escapes, JA 270-271, and his plan to take a correctional officer hostage, JA 271-272, and invited the jury to conclude from this evidence that "shanks will be shanks. And murderers will be murderers. And he is the cold-blooded one right over there." JA 272. He reminded the jury that petitioner had bragged and joked about his crimes while in jail. JA 275. Finally, he again told the jury "that we are seeking the death penalty and we expect the death penalty," and concluded, "Folks, if you don't give him the death penalty, anything less will be a final stab to the memory of Shirley and Sidney Bruce." JA 276.[4]

In keeping with his pre-argument ruling, the trial judge gave the jury no instructions concerning the unavailability of parole release for murderers sentenced to life imprisonment, stating only that "the terms 'life imprisonment' and 'death sentence' are to be understood in this ordinary and plain meaning." JA 289.[5] While

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[4] Sidney was the name that the victim's family gave to her dead fetus, after it was removed from her womb at autopsy. The unborn child was placed in its mother's arms in her casket for burial, and the state's case in aggravation of punishment included a description by the victim's sister of the effect of viewing the tiny infant's corpse in its dead mother's arms. R. 1858.

[5] Despite this Court's determination in *Simmons* that such a "plain meaning" instruction does not protect capital defendants against jurors' prejudicial misconceptions concerning parole, 512 U.S. at 169-170 (plurality opinion), 177-78 (O'Connor, J., concurring), the South Carolina Supreme Court continues to require that the instruction be given. *Compare State v. Southerland*, 447 S.E.2d 862 (S.C. 1994) (*Simmons* charge not

declining to further define life imprisonment, the trial judge did advise the jury that "the death penalty . . . in this state is by electrocution or lethal injection." JA 289.

Following the sentencing instructions, defense counsel renewed her objection to the trial court's failure to charge the jury regarding petitioner's ineligibility for parole, or in the alternative, to charge the jury that petitioner's future dangerousness was not an issue in the case. JA 304. The judge again refused both requests. After deliberating for 43 minutes, the sentencing jury found all five statutory aggravating circumstances alleged by the state, and returned a binding recommendation of death. JA 305-307.

On appeal to the South Carolina Supreme Court, petitioner renewed his argument that *Simmons v. South Carolina* entitled him to advise the jury of his ineligibility for parole had he been sentenced to life imprisonment. *State v. Kelly*, Brief of Appellant at 2-13; Reply Brief at 3-5. In response, the state relied in part on a since-invalidated rationale for avoiding the effect of *Simmons*: namely, that *Simmons* had been rendered inapplicable to South Carolina's capital sentencing scheme by the 1995 statutory amendments. Brief of Respondent at 19-27. The state also argued that the prosecutor had not raised future dangerousness outside of prison as an issue, and that petitioner was therefore not entitled to a *Simmons* instruction. Brief of Respondent at 27-39.

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required because prosecutor agreed not to "argue" future dangerousness) *with Southerland v. State*, 524 S.E.2d 833 (S.C. 1999) (appellate counsel ineffective for failing to raise denial of "plain meaning" instruction).

With one justice dissenting, the South Carolina Supreme Court accepted both of the state's arguments, holding that the record did not satisfy the "future dangerousness" requirement of *Simmons*, *State v. Kelly*, 540 S.E.2d 851, 857 (S.C. 2001), JA 324-326, and also that the 1995 amendments placed South Carolina's sentencing scheme outside the ambit of *Simmons* in any event. *Id.*, at 857-58, JA 326-329. With regard to future dangerousness, the state court majority first opined that the state's evidence regarding petitioner's attempted escapes, his frequent talk about escaping, and his possession of a shank "simply is not the type of future dangerousness evidence contemplated by *Simmons*." *Id.* at 857, JA 324. While acknowledging that "evidence of Kelly's future danger to others within prison . . . was clearly presented by the State," *id.* at 859, JA 331, the state supreme court held that this evidence *only* placed in issue his ability to adapt to prison life, and did not invite the jury to weigh "what is considered 'future dangerousness' under *Simmons*, i.e. a future danger to society." *Id.*, JA 331.

To petitioner's argument that the prosecutor had also raised the issue of petitioner's dangerousness directly in his closing argument, the state court responded that "the State consciously avoided any implication of future dangerousness," and did not explicitly ask the jury to impose the death penalty based on petitioner's future danger to society. *Id.* at 857, JA 326. For these reasons, the state court concluded that future dangerousness "was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument." *Id.*, JA 326.

Petitioner also raised on appeal the trial court's refusal to instruct the jury that petitioner's future dangerousness was not an appropriate sentencing consideration. Brief of Petitioner at 14-16. The state argued that such an instruction would have been improper in this case, because the prosecutor "did not stipulate to the factual issue that future dangerousness was not in issue; instead, he merely agreed not to argue future dangerousness in closing." Brief of Respondent at 42. The South Carolina Supreme Court agreed with the state, holding that the proposed instruction would have improperly precluded the jury from considering the evidence presented by the prosecution to show that petitioner posed a danger within a prison setting. 540 S.E.2d at 859, JA 331.

SUMMARY OF ARGUMENT

In *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001), this Court invalidated one of the two bases of the South Carolina Supreme Court's affirmance of petitioner's sentence – namely, that post-*Simmons* changes in South Carolina's capital sentencing procedures had wholly eliminated the state's obligation to inform sentencing juries of the nonexistence of parole. The constitutionality of petitioner's sentence thus rests on the validity of the state court's remaining justification for denying his request for a *Simmons* instruction, which was that the prosecution never placed his future dangerousness at issue. This rationale is belied by the record.

The state prepared the way for what would prove to be an onslaught of dangerousness rhetoric by placing

before the jury evidence of petitioner's pretrial escape attempts, his possession of weapons in jail, his plan to take a correctional officer hostage, his expressed lack of remorse, his obsessive homicidal ideation, and his history of torturing small animals. In addition, the trial court permitted the prosecution to introduce, as evidence of petitioner's "character," graphic depictions of the extreme brutality with which he murdered the victim. Then, in his sentencing phase jury argument, the prosecutor squarely put before the jury the issue of petitioner's future dangerousness. The prosecutor implied that petitioner was a second Billy the Kid, and referred to him as "Bloody Billy" and as "the Butcher of Batesburg." He told the jury that "murderers will be murderers," and called petitioner "cold-blooded" and "more frightening than a serial killer, more frightening than a career criminal." He even asserted – while denying that he was making an issue of petitioner's dangerousness – that petitioner's lack of any mental disability rendered him "more dangerous" to those around him.

The state supreme court did acknowledge that the evidence relating to petitioner's misconduct in jail tended to prove his future dangerousness, but insisted that in-prison dangerousness does not implicate the rule of *Simmons* because such evidence is not rebutted by proof of parole ineligibility. This reasoning overlooks that violent behavior in prison is highly predictive of violent behavior in the general society, should the defendant ever be released.

Nor is there any validity to the South Carolina courts' distinction between evidence of petitioner's "character" and evidence of his future dangerousness.

Because the state's depiction of petitioner's "character" was that of a remorseless, unpredictable and incorrigible killer, the message the state sought to convey to the jury was that in this case, "dangerousness" and "character" amounted to the same thing. Accordingly, under *Simmons*, petitioner should have been allowed to respond to the state's case for death by showing that he would never be eligible for parole if sentenced to life imprisonment.

South Carolina's resistance to this Court's decision in *Simmons* should end here. The Court should disapprove South Carolina's myopic view of *Simmons'* dangerousness requirement, and should make clear that that requirement is satisfied whenever the prosecution introduces evidence from which a capital sentencing jury could reasonably infer that the defendant would be dangerous if released.

ARGUMENT

1. The South Carolina Supreme Court's holding that *Simmons* does not apply to the statutory scheme governing petitioner's sentencing hearing has been overruled by this Court's intervening decision in *Shafer v. South Carolina*, 532 U.S. ___, 121 S. Ct. 1263 (2001).

Petitioner's case is yet another in a series of decisions which recently led this Court to observe that "South Carolina has consistently refused to inform the jury of a capital defendant's parole eligibility status." *Shafer v. South Carolina*, 121 S. Ct. 1263, 1271 (2001). This time, as related above, the state court's refusal rests on alternative holdings. First, the state supreme court held that while

the state's evidence and jury argument "clearly" placed in issue petitioner's future dangerousness, they did so in a way that failed to trigger the due process rule of *Simmons v. South Carolina*, 512 U.S. 154 (1994). And second, the state court reiterated its holding, previously announced in *State v. Starnes*, 531 S.E.2d 907 (S.C. 2000), and *State v. Shafer*, 531 S.E.2d 524 (S.C. 2000), that *Simmons* is in any event inapplicable to the current South Carolina sentencing scheme.

The second of these holdings has now been expressly rejected by *Shafer v. South Carolina, supra*. In *Shafer*, this Court held that the possibility of a less-than-life sentence in cases where the prosecution fails to establish the defendant's death-eligibility does not remove South Carolina's sentencing scheme from the ambit of *Simmons*. The state court's decision to the contrary cannot stand in light of *Shafer*.

2. Because the prosecution presented both evidence and argument calculated to persuade the jury that petitioner would be dangerous unless executed, *Simmons* entitled him to an instruction that he would be ineligible for parole if sentenced to life imprisonment.

The South Carolina Supreme Court also held that the state did not place petitioner's future dangerousness in issue as required by *Simmons*, opining that dangerousness, as that concept is employed in *Simmons*, was "neither a logical inference from the evidence nor was it injected into the case through the State's closing argument." *State v. Kelly, supra*, 540 S.E.2d at 857, JA 326. This

holding was incorrect on both points: the issue of petitioner's future dangerousness was *both* a logical inference from the state's evidence *and* was hammered home in closing argument. The state supreme court majority's holding to the contrary reflects a recalcitrant refusal to implement this Court's decision in *Simmons*, and should be reversed.

A. The prosecutor's argument, standing alone, plainly raised the issue of future dangerousness as a sentencing issue.

The South Carolina Supreme Court notwithstanding, the record of this case is replete with generalized claims of future dangerousness. Most egregious was the prosecutor's explicit assertion during closing argument that petitioner was all the more dangerous because his lack of mental disability rendered his crimes unpredictable. In making this argument ("Doesn't that make somebody a little more dangerous[?]"), the prosecutor appears to have momentarily forgotten the "no-dangerousness" charade by which he was attempting to circumvent this Court's decision in *Simmons*: his subsequent attempt to confine this general allegation of future dangerousness to the already-murdered victim seems a hastily-improvised (and somewhat illogical) response to defense counsel's *Simmons*-related objection.

Nor was this the only explicit reference to generalized future dangerousness in the prosecutor's somewhat inflammatory summation. Throughout his closing argument, the prosecutor portrayed petitioner as an incorrigible killer: he evoked the memory of Billy the Kid,

tagged petitioner as "Bloody Billy" and as "the Butcher of Batesburg," provided the jury with future-dangerousness aphorisms such as "murderers will be murderers," and expressed the hope that the jurors would never again be so close to a murderer as they were at that moment. He called petitioner "cold-blooded" and "more frightening than a serial killer, more frightening than a career criminal." And this cascade of dangerousness rhetoric was fed not only by the state's evidence regarding petitioner's extremely violent crime and his misconduct in jail, but also by prosecution cross-examination about petitioner's obsessive thoughts of killing people, and his history of torturing and killing small animals.

Even if the prosecutor did modulate parts of his summation as a tactic intended to avert a truthful *Simmons* instruction, his argument raised petitioner's alleged future dangerousness much more explicitly than anything in *Simmons* itself. In that case, the sum total of the prosecutor's argument on future dangerousness was as follows:

> The question for the jury, the prosecution argued, was "what to do with [petitioner] now that he is in our midst." The prosecution further urged that a verdict for death would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense."

512 U.S. at 157, 177. These veiled references to Simmons' dangerousness were just that: *veiled* references. Indeed, two dissenting Justices detected nothing at all in the prosecutor's argument that even referred to Simmons' future behavior: to the dissenters, the "in-our-midst" passage referred only to Simmons' alleged attempt to blame

his crimes on his childhood environment, while the "self-defense" reference was merely an appeal for a calm and dispassionate societal response to Simmons' brutal crimes, rather than a sentence based on anger or emotion. 512 U.S. at 181-82 (Scalia, J., dissenting). If the prosecutor's argument in *Simmons* sufficed to place Simmons' dangerousness in issue, so did the much more explicit cross-examination and argument here.

B. There is no basis in law or logic for South Carolina's insistence that a convicted murderer's future dangerousness in prison carries no inference of future dangerousness outside of prison.

The state court did acknowledge that the prosecutor "clearly presented" both evidence and argument to the effect that petitioner would pose a violent escape risk *while incarcerated*. 540 S.E.2d at 855-57, JA 321-326. According to the South Carolina Supreme Court, however, this explicit claim of future dangerousness did not implicate the *Simmons* right of rebuttal because the fact of petitioner's parole ineligibility did not directly rebut the state's implication that he would attempt to secrete weapons, take hostages and escape if he was not executed. *Id.* at 857, JA 325.

Of course, a dangerous prisoner can fashion weapons, take hostages and try to escape whether or not he is eligible for parole. What the state court overlooked, however, is that evidence of dangerousness in prison is *also* powerful evidence of dangerousness *outside* of

prison, where the defendant will have much more freedom to indulge whatever violent impulses he may harbor. Evidence that for this particular defendant, not even prison was effective in curbing his violent tendencies created a particularly strong inference of generalized future dangerousness.[6] So while an accurate instruction on petitioner's parole ineligibility would not have answered the state's claim that he would be dangerous while serving a life sentence in prison, it would have allayed the jury's inevitable concern that petitioner would prove all the more violent should he ever be paroled back into society.

One facet of the state's case – petitioner's alleged hostage-taking plan – was especially likely to have reminded the jury of the obvious relationship between in-prison and out-of-prison dangerousness. The state's claim that petitioner tried to lure a slightly-built female jail officer into his cell while hiding a homemade knife behind his back must have struck the jury as similar to the facts of the Shealy murder itself. If petitioner was inclined to repeat such crimes even while confined in the highly restrictive setting of a county jail, the jury surely reasoned, he would be particularly likely to do so if and when he was released from prison.

---

[6] While a jury would hardly require scientific confirmation of this self-evident proposition, current research on violent recidivism does indicate that a history of violent behavior in prison increases the likelihood of violent behavior if and when the offender is released. Vernon L. Quinsey, *et al.*, *Violent Offenders: Appraising and Managing Risk* 161 (1998).

In this connection, the South Carolina Supreme Court may have misunderstood the Court's observation in *Simmons* concerning the relationship between accurate instructions on parole ineligibility and dangerousness in prison. As the *Simmons* plurality noted,

> the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger. The State is free to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff. But the State may not mislead the jury by concealing accurate information about the defendant's parole ineligibility.

512 U.S. at 165. Likewise, Justice O'Connor observed that whenever due process entitles a capital defendant to inform the jury of his parole ineligibility, "the prosecution is free to argue that the defendant would be dangerous in prison." *Id.* at 177. These passages make clear that proof of a defendant's likely misconduct in prison is a permissible basis for argument by the prosecutor that only a death sentence can protect against the defendant's foreseeable future depredations *whether or not he is legally ineligible for parole*; but such proof is not, as the prosecutor and the South Carolina Supreme Court seemed to think, a basis for concealing from the jury the crucial information that, in fact, the defendant *is* ineligible for parole.[7]

---

[7] The one federal case cited by the South Carolina Supreme Court on this point appears to reflect a similar misreading of *Simmons*. In *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994), the court suggested in *dictum* that "when the state argues that the defendant poses a future danger to everybody, fellow inmates included, then *Simmons* is inapplicable because whether the defendant is eligible for parole is irrelevant." This suggestion was not necessary to the judgment, because the defendant in *Allridge* was actually eligible for parole under state law. Outside of South Carolina, no court appears to have upheld the denial of a *Simmons* instruction solely because the state's proof of the defendant's dangerousness was restricted to the controlled and highly-structured setting of prison.

C. The applicability of *Simmons* should not depend on prosecutors' creativity in manipulating the elusive distinction between evidence of character and evidence of future dangerousness.

In denying petitioner's request for a *Simmons* instruction, the trial judge ruled that the state's evidence of future dangerousness actually went to petitioner's "character and characteristics." This purported distinction between bad character and dangerousness does find support in prior South Carolina decisions, *see, e.g., State v. Young*, 459 S.E.2d 84, 87 n.4 (S.C. 1994), but this Court's cases are to the contrary. *California v. Ramos*, 463 U.S. 992, 1006 n.20 (1983) ("[A] . . . jury's evaluation of the defendant's future dangerousness may rest on lay testimony about the defendant's character and background and the inferences to be drawn therefrom"); *Ramdass v. Angelone*, 530 U.S. 156, 171 (2000) ("To demonstrate Ramdass' evil character and his propensity to commit violent acts in the future, the prosecutor used Ramdass' prior criminal conduct. . . . "). In this context, moreover, the distinction is meaningless. When the prosecution seeks to prove that a teenaged murderer has exhibited unpredictable and extreme violence, lacks remorse, and behaves violently in

jail, it is trying to prove that his character is one of persistent and violent criminality – which is to say, that he is dangerous and will remain so. The defendant's right to inform the jury that he will never be released from prison does not depend on whether this portrayal is labeled "dangerousness" or "character," because in this setting the two terms mean the same thing. *See Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) (rejecting South Carolina's effort to distinguish between capital defendant's "past good conduct to prove good character and use of the same evidence to establish future good conduct in prison.").

In states where dangerousness is a formal statutory factor, prosecutors generally rely on precisely the type of evidence that the state introduced here to meet their burden of proving dangerousness. Courts in both Virginia and Texas – states where future dangerousness is a formal statutory aggravating factor – have held that the facts of the capital murder *alone* may support a finding of dangerousness beyond a reasonable doubt. *See, e.g., Pope v. Commonwealth*, 360 S.E.2d 352, 361 (Va. 1987); *Bell v. State*, 938 S.W.2d 35, 42 (Tex. Crim. App. 1996). In addition, given that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing," *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), prosecutors usually present any available evidence of prior convictions and other violent or anti-social conduct to prove future dangerousness. *See e.g., Johnson v. Texas*, 509 U.S. 350, 355 (1993) (state proved future dangerousness by introducing 19-year-old offender's prior crimes); *State v. Tucker*, 478 S.E.2d 260, 269-70 (S.C. 1996) (recognizing that

evidence of past criminal behavior is highly relevant to both character and future dangerousness of convicted murderer). While the weight to be accorded such evidence in establishing future dangerousness for any given offender may be open to dispute, this much is not: when the prosecution proves a grisly, premeditated murder of a defendant's pregnant co-worker, and then presents "character" evidence at sentencing that the defendant bragged about his offense, defied jail authorities, attempted to escape, and plotted a hostage-taking at knife-point, any rational sentencer will likely consider the possibility of violent future behavior before deciding to spare the defendant's life. The state having presented the evidence that triggers this concern, the defendant has a due process right to allay it if he can, and *Simmons* clearly entitles him to attempt to do that by informing the jury that he would never be eligible for parole.

D. South Carolina's resistance to *Simmons* will persist until this Court makes unmistakably clear how far *Simmons* extends.

This is not the first time that the South Carolina Supreme Court has avoided applying *Simmons* by refusing to acknowledge the state's injection of a capital defendant's future dangerousness as a sentencing issue. *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994); *sentence vacated on other grounds*, 524 S.E.2d 833 (S.C. 1999). More importantly, it may not be the last. *Shafer v. South Carolina*, 121 S. Ct. 1263 (2001), is currently pending before the South Carolina Supreme Court on remand from this Court for a determination of whether the state's evidence and argument placed future dangerousness "at issue," and *State v.*

Haselden, No. 99-GS-32-3064 (appeal pending S.C. S. Ct.), a case involving the same prosecutor and trial judge as does this one, will soon present the question yet again. Of course, each of these cases involves its own facts, and although the sentencing juries in all three likely considered the issue of the defendants' future dangerousness, the state has already begun to urge that the facts of *Shafer* and *Haselden* are less egregious than – and thus distinguishable from – those of this case. Indeed, in successfully opposing a *Simmons*-based motion for a new sentencing trial in *Haselden, supra*, prosecutor Myers recently cited his own jury argument and the South Carolina Supreme Court's opinion in this case to show that his *Haselden* argument did not mandate a *Simmons* instruction:

> Now, [defense counsel] always try to say I argue future dangerousness and the [state] supreme court keeps telling them, No, he doesn't. [The court] said I didn't argue future dangerousness in *State versus Southerland*, [447 S.E.2d 862 (S.C. 1994)]. They said I didn't argue future dangerousness in *State versus Luke Williams*, [468 S.E.2d 626 (S.C. 1996)]. They said I didn't argue future dangerousness in *State versus William Arthur Kelly*, 540 S.E.2d 855 . . .
>
> In *Kelly*, I even talked about Mr. Kelly attempting to escape from the Lexington County jail. I put in evidence Mr. Kelly was going to hold a female correctional officer to escape and he was making a shank. I put in evidence that he had a shank in his cell. . . . And I also talked about the escape and I argued about the escape. I also put in evidence that Mr. Kelly, he had murdered a woman down at the Kentucky Fried Chicken place, a pregnant woman, and at the jail he wanted to be called K.F.C. and that he went around with a styrofoam cup with a chicken with his head cut off with blood coming down it for what he had done to Shirley Shealy in that case.
>
> Oh, they argued that was future dangerousness. The Supreme Court of South Carolina said, No sir, it isn't. Solicitor Myers doesn't put in future dangerousness.
>
> I said – I called him he's worse than a mass murderer, that it's an unpredictable crime and more frightening than a serial killer. I called him a career criminal. But you kind of trust those people like him when he's not a serial killer a little bit more, it makes him more dangerous for this victim, unpredictable for Sherry Shealy. I said, Murderers will be murderers.
>
> Through all that, through all their arguments the South Carolina Supreme Court said, First, we agree with the trial court that the state's evidence did not implicate future dangerousness.

State v. Haselden, supra, Trial Transcript at 2336-38 (April 5, 2001).

This prosecutor may be unusual for the zeal with which he has sought to evade the effect of this Court's decision in *Simmons*, and for the candor with which he recounts his success so far. But Mr. Myers is not alone among South Carolina prosecutors in seeking to take advantage of the state courts' lax enforcement of the *Simmons* rule. As counsel for South Carolina recently

acknowledged before this Court, South Carolina prosecutors make "tactical decision[s]" to avoid arguing about capital defendants' future dangerousness precisely so as to avoid having to inform the jury, under *Simmons*, that the defendant will never be paroled. *Shafer*, *supra*, Tr. of Oral Arg. at 38-39 (Jan. 9, 2001).[8] Given the continuing unwillingness of South Carolina prosecutors and courts to enlighten sentencing juries concerning the actual alternative to the death penalty that South Carolina's legislature has established, only a clear restatement of the *Simmons* rule will obviate the necessity of further case-by-case review by this Court.

Accordingly, petitioner submits that the Court should now hold that future dangerousness is "in issue" within the meaning of *Simmons* when

(a) the prosecution presents evidence from which a jury could find the defendant poses a future danger,

(b) the prosecutor's argument states or implies that the defendant poses a future danger, or

(c) the judge instructs the jury to consider the issue of future dangerousness.

---

[8] It is significant that the only two defendants to have received sentencing phase relief from the South Carolina Supreme Court under *Simmons* were both tried prior to June 17, 1994, the date of the *Simmons* decision – and thus before South Carolina prosecutors could tailor their courtroom presentations with a view to evading the holding of that case. *State v. Tucker*, 464 S.E.2d 105 (S.C. 1995) (tried November 29 to December 7, 1993); *State v. Rogers*, 466 S.E.2d 360 (S.C. 1996) (tried February 28 to March 5, 1994).

In jurisdictions like South Carolina, where future dangerousness is not a statutory aggravating circumstance, and where the jury considers all of the evidence relevant to sentencing once death-eligibility is established, S.C. Code § 16-3-20(B) (Supp. 2000), *State v. Shaw*, 255 S.E.2d 799, 808 (S.C. 1979), future dangerousness instructions will not normally be given, and the *Simmons* rule will be triggered, if at all, either by the state's evidence or by argument, or (as here) by both.

This restatement of the *Simmons* rule would work no change in the rule itself. Nothing in *Simmons* limited its reach to cases in which the prosecution made an explicit claim of dangerousness in its sentencing phase jury argument, and *Shafer* has already made clear that future dangerousness may be placed "at issue" by either "the prosecutor's evidentiary submissions *or* closing argument." 121 S. Ct. at 1274-75 (emphasis added). Indeed, in this very case the South Carolina Supreme Court acknowledged that future dangerousness can become an issue by virtue of the state's evidence alone, since the state court's rejection of petitioner's *Simmons* claim rests on its conclusion that dangerousness "was neither a logical inference from the evidence nor was it injected into the case through the state's closing argument." 540 S.E.2d at 857, JA 326. Given this acknowledgment, one would be hard-pressed to think of any workable standard other than evidentiary sufficiency (that is, whether the evidence before the jury suffices to support an inference of future dangerousness) in determining whether *Simmons* applies. Any more demanding standard would fail to protect against the evil with which *Simmons* is concerned – that a jury would sentence a defendant to death out of a

misplaced fear that he would otherwise be paroled, and thereby allowed to resume his violent conduct. *See generally*, William J. Bowers and Benjamin D. Steiner, *Death by Default: an Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); Theodore Eisenberg, *et al.*, *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001).

Virtually alone among the nation's death penalty jurisdictions, *see Shafer, supra*, 121 S. Ct. at 1271 n.4, South Carolina continues to devise new rationales for its unfair and unconstitutional refusal to inform sentencing juries of the alternative to the death penalty that state law provides. By refusing to acknowledge the state's obvious injection of the issue of future dangerousness into petitioner's sentencing hearing, the South Carolina Supreme Court has sought, once again, to vitiate the *Simmons* rule. *See Penry v. Johnson*, 121 S. Ct. 1910, 1924 (2001) (indicating that the South Carolina Supreme Court's mischaracterization of the operation of state law had led, in *Shafer*, to an objectively unreasonable limitation on *Simmons*). The Court should not permit such persistent disregard of one of its constitutional precedents.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be reversed to the extent that it leaves petitioner's death sentence undisturbed.

Respectfully submitted,

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CODE OF LAWS OF SOUTH CAROLINA 1976
ANNOTATED TITLE 16. CRIMES AND OFFENSES
CHAPTER 3. OFFENSES AGAINST THE PERSON
ARTICLE 1. HOMICIDE

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the ~~t~~rial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so

long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the

State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in Section 44-53-370(e), § 44-53-375(B), § 44-53-440, or § 44-53-445;

(h) physical torture; or

(i) dismemberment of a person.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory

aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person

called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

FOR ARGUMENT

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In the
Supreme Court of the United States

WILLIAM ARTHUR KELLY, *PETITIONER*,

v.

SOUTH CAROLINA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Whether the due process right of rebuttal identified in *Simmons v. South Carolina*, 512 U.S. 154 (1994), required an instruction on parole ineligibility, even though the prosecution did not expressly raise future dangerousness to society as a basis for death, and there is nothing to suggest the jury was concerned with or confused about the defendant's parole status?

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ARGUMENT 17

I. In order for the rule in *Simmons* to be triggered, future dangerousness to society must be expressly presented to the jury; parole ineligibility does not to rebut purely retributive arguments based on the circumstances of the capital crime or the defendant's other misconduct, nor does it rebut arguments or evidence that the defendant will be dangerous in prison. 17

A. Petitioner posits a test without standards and suggests an expansion of *Simmons*, with his argument that future dangerousness to society is raised merely by evidence and argument of prior bad acts or circumstances of the capital crime. .. 18

B. For *Simmons*'s due process right of rebuttal to be triggered, future dangerousness to society must be expressly submitted to the jury through either prosecution argument, evidence, or the judge's charge. 25

C. *Simmons* is not triggered by prosecution argument as to a defendant's future dangerousness to other inmates and prison staff, because information about the unavailability of parole does nothing to rebut such a claim. 30

D. It is not inappropriate for prosecutors to decide as a tactical matter whether or not to raise future dangerousness to society. 35

II. The prosecution in Petitioner's case did not expressly raise future dangerousness to society but rather focused on retribution. 37

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III. Since the jury never inquired about parole and the trial judge did not broach the issue by giving a "no concern" charge, *Simmons* was satisfied by the judge's plain meaning instruction and the defense's argument to the jury that Petitioner would never leave prison. 47

IV. South Carolina may remain true to its state law rule that disfavors introduction of collateral circumstances such as parole, as long as the state honors the due process rule of *Simmons* in the limited situations to which it applies. 49

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CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina affirming Petitioner's convictions and sentences is reported as *State v. Kelly*, 540 S.E.2d 851 (S.C. 2001). This decision is reprinted in the Appendix to Petitioner's brief.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on January 8th, 2001. The petition for writ of certiorari was granted on June 25, 2001. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257, Petitioner having asserted below, and asserting herein, deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-10 *et seq.* of the Code of Laws of South Carolina, which is reprinted in the Appendix to Petitioner's Brief.

RESPONDENT'S STATEMENT OF THE CASE

A. Procedural History

Petitioner, William Arthur Kelly, is presently confined to the Lieber Correctional Institution of the South Carolina

Department of Corrections pursuant to orders of commitment from the Clerk of Court for Lexington County. During the November 1996 term, the Lexington County Grand Jury indicted Petitioner for murder, kidnapping, armed robbery, and possession or display of a knife during the commission of a violent crime. JA 2-4. On October 14th, 1997 and February 16th, 1998, Eleventh Circuit Solicitor Donald V. Myers gave notice of intent to seek the death penalty, and on August 13th, 1998, the state served its Notice of Evidence in Aggravation.

The case was called for trial before the Honorable Gary E. Clary and a jury on September 14th, 1998. On September 17th, 1998, Petitioner's jury convicted him of all four charges.

The sentencing phase of his trial began on September 18th, 1998. After presentation of evidence, Judge Clary submitted the following aggravating factors to the jury:

> (1) Murder committed while in the commission of a kidnapping;
>
> (2) Murder committed while in the commission of a burglary;
>
> (3) Murder committed while in the commission of a robbery while armed with a deadly weapon;
>
> (4) Murder committed while in the commission of larceny with use of a deadly weapon;
>
> (5) Murder committed while in the commission of physical torture.

JA 291-92. The following mitigating factors were submitted to the jury:

> (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;
>
> (2) The age of the defendant at the time of the crime;
>
> (3) The defendant was below the age of eighteen at the time of the crime.

Judge Clary also instructed the jurors that they could consider any non-statutory mitigating circumstance. JA 297.

On September 19th, 1999, Petitioner's jury found the existence of all five (5) aggravating factors and recommended a sentence of death. That same day, Judge Clary sentenced Petitioner to death for murder, to thirty (30) years for armed robbery, and to a consecutive five (5) years for possession of a knife during commission of a violent crime. Since Petitioner was sentenced to death, Judge Clary did not sentence him for kidnapping pursuant to the rule in section 16-3-910 of the Code of Laws for South Carolina. R. 2094-97.

A timely Notice of Appeal was filed and served on September 21st, 1998. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by Assistant Appellate Defender Robert M. Dudek. Assistant Attorney General S. Creighton Waters represented Respondent. Both parties filed briefs in the appeal, and Petitioner presented the following issues, *inter alia*:

> I. Whether the judge denied Due Process by refusing to instruct the jury that "life imprisonment" meant imprisonment "until death of the offender", since the state offered evidence

of future dangerousness, the solicitor argued future dangerousness, and appellant's request to charge #1 was a correct statement of South Carolina law, was mandated by *Simmons v. South Carolina*, and the judge had a duty to charge it?

II. Whether the judge erred by refusing to charge, in the alternative, that future dangerousness was not an issue, since the state stipulated that future dangerousness was not an issue, and appellant was entitled to have that stipulation, defense request to charge #2, heard by the jury?

The South Carolina Supreme Court heard oral argument on September 20th, 2000, and the court issued its opinion affirming Petitioner's conviction and sentence on January 8th, 2001. *State v. Kelly*, 540 S.E.2d 851 (S.C. 2001). On January 23rd, 2001, Attorney Dudek filed on behalf of Petitioner a "Petition for Stay of Execution". The Remittitur was sent down on January 24th, 2001. On January 25th, 2001, the state filed a letter Return in which it did not object to Petitioner's requested stay of execution. The South Carolina Supreme Court on February 7th, 2001 granted the motion for stay of execution.

Petitioner sent his petition for writ of certiorari to the United States Supreme Court on April 3rd, 2000, and the petition was docketed on April 5th, 2000. Certiorari was granted on June 25th, 2001.

B. Statement of the Guilt Phase Evidence Presented at Trial

Although the defense requested and the judge gave a charge on voluntary manslaughter at trial, it is undisputed that Petitioner brutally killed 25-year-old and pregnant Shirley Slade

Shealy by stabbing her over thirty times at a Kentucky Fried Chicken (KFC) restaurant in Batesburg. Shealy was Petitioner's former boss and a close friend of his sister.

Shealy was the manager of the KFC restaurant and was last seen closing up for the night. A police officer who observed Shealy's left running with the door open in the KFC parking lot discovered a grisly scene inside the restaurant. When found, Shealy's hands were bound behind her back with duct tape, and she was near an overturned chair covered with blood and tape. A piece of an opaque latex glove was found attached to the duct tape, and a bloody dive knife was found on a rack in the kitchen. Over $1000 in cash was scattered throughout the scene, including a number of bills found stuck to the victim with her own blood. When the floor safe was later opened, it was virtually empty except for a ripped deposit bag and a deposit slip. R. 1292-93, 1302, 1337-39, 1423-42, 1510-11, 1565.

Large amounts of blood spatter throughout the kitchen and hallway of the restaurant indicated a struggle and repeated violent blows during Petitioner's sustained assault on Shealy. JA 27-33; R. 1437-43. The pathologist, Dr. Sexton, testified that there were thirty-one (31) stab or incision wounds to Shealy, including around twenty (20) wounds to her back. Petitioner also slit Shealy's throat from ear to ear, severing both her jugular vein and her airway. Shealy had no defensive wounds because he hands were bound behind her back. JA 34-45.

Items in the back seat floorboard of the victim's car had been pushed over to the passenger side, leading police to theorize that Petitioner had concealed himself in Shealy's car and waited for her. R. 1295, 1331-33, 1451-54.

Police promptly started interviewing KFC employees and others who were at the KFC on January 5th. Eventually, they

attempted to contact Petitioner, but they found out he did not come home that night. Petitioner's mother filed a missing persons report on Petitioner the next day. R. 1335-37.

The break in the case came on the afternoon of January 8th, when Petitioner's mother told police that Petitioner was at his sister's house in Lowell, Massachusetts. R. 1340-41, 1353-54. There, Lowell police found Petitioner, who orally admitted to the murder and later signed a written statement. In the statement, Petitioner claimed he had to stab Shealy because she kept trying to have sex with him. He stated he panicked, took some money, and drove from South Carolina to Lowell. He stopped to buy some clothes on the way. JA 16-27; R. 1358-64, 1365-74.

When Lowell police searched Petitioner, they found cash stained with Shealy's blood. R. 1387, 1470, 1555. Petitioner's car also contained his pants, T-shirt, and shoes covered in the victim's blood. R. 1462-64, 1556. Finally, sneakers found in Petitioner's car matched bloody footprints found at the scene. R. 1475-76.

Further proof of Petitioner's robbery plan came from employees of the KFC, who testified that it was common knowledge among employees that money taken in after late afternoon was kept overnight in the floor safe. R. 1258, 1490-91. The employees also testified that the knife, duct tape, and latex gloves used by Petitioner were not of the type normally used by the KFC. R. 1268-70, 1495-97, 1500-01.

The defense rested in the guilt phase without presenting a case.

C. Presentation and resolution of the federal issue at trial

During his opening statement in the penalty phase, the solicitor began with themes of retribution, stating that the death penalty was the "only one sentence for the brutal, bloody, butchering murder [that Petitioner] committed", and that the death penalty was "the punishment that fits the crime". JA 63-64. After discussing the aggravating factors, the solicitor recounted how the murder and robbery was planned, and pointed out that Petitioner killed the victim even though he knew she was pregnant. JA 64-67. The solicitor concluded by again stating that "there's only one sentence for this crime". JA 68.

The state's penalty phase evidence began with the pathologist and crime scene analysts, who testified about Petitioner's exceptionally brutal and prolonged assault on pregnant Shirley Shealy. JA 156-75; R. 1802-19. The pathologist testified that Shealy's baby was healthy and normal, and might have even survived had it been born in a hospital setting at the time of the mother's death. JA 175-78. The state also presented victim impact testimony from family members about the devastating effect Shealy's death had on her husband, young son, parents, in-laws, and siblings. R. 1848-80.

Jail guards testified about Petitioner's behavior in prison, including an incident where Petitioner refused to obey orders. JA 72-74. Petitioner also was in a small cell with two others where correctional officers discovered that the mortar around a cinder block had been dug away. The inmates attempted to conceal the work by stuffing colored toilet tissue in the cracks. JA 78-84, 91-102, 106-17.

A fellow inmate testified that Petitioner frequently talked of escape and even targeted a particular slightly-built female

guard as his hostage. One time, Petitioner hid a shank in his hand when he called the guard over to the cell door, but he ultimately backed out of his escape plan. JA 129-33. A correctional officer confirmed finding on Petitioner a shank made from a toothbrush and a metal object. JA 139-42.

Another former inmate testified that Petitioner bragged about his crime, asked other inmates to call him "KFC," and talked about taking a nurse hostage. JA 146-49. Petitioner carried a styrofoam cup on which he had drawn a knife, a decapitated chicken, and the words "KFC". JA 134-35, 148-49.

The defense case in mitigation began first with evidence that Petitioner had no history of significant criminal convictions or juvenile adjudications. R. 1886, 1888. Petitioner's mother testified that he had a normal childhood and even did well academically until high school, when his grades went bad and he started getting into trouble. R. 1893-1903.

A defense psychologist stated that Petitioner has average intelligence and no mental illnesses. The most the psychologist could say is that Petitioner might have been on his way to an alcohol problem. According to the psychologist, Petitioner is adaptable to prison, and Petitioner's possession of a shank, talk of escape, and drawing of a decapitated chicken was just the typical "puffing" often done by younger, smaller-built inmates. JA 178-93. On cross-examination, the state asked the defense psychologist how his opinion about adaptability and Petitioner's lack of mental illness was affected by reports in the mental health records that Petitioner had violent fantasies of getting away with killing people who have wronged him, and had tortured and killed small animals. JA 194-99, 218-19.

Former warden James Aiken also testified Petitioner was adaptable to prison life and easily managed and contained by the South Carolina Department of Corrections. Aiken theorized that Petitioner might be victimized in the harsh world of prison. JA 220-42; R. 1971-73.

Before closing arguments in the sentencing phase, the defense requested the judge charge from S.C. Code § 16-3-20(A) that a life sentence meant "until death of the offender", and could not be reduced by parole, community supervision, any type of work or early release program, or any type of credits. After the solicitor stated that there were no *Simmons v. South Carolina* issues because he was not going to argue future dangerousness, the defense asserted the state had in fact raised future dangerousness through evidence of escape attempts, a plan to take a guard hostage, and cross-examination of the defense experts on jail records. In response, the solicitor stated that those only went to past conduct, and he did not bring in a mental health expert to testify Petitioner would be dangerous in the future. The solicitor also noted the distinction under *Simmons* between danger to those inside prison and danger to outside society. The trial court ultimately ruled that the future dangerousness prong of *Simmons* had not been met, and denied the request to charge. JA 243-48, 249, 252-54.

After the trial court denied the defense's request for the verbatim charge from subsection 16-3-20(A), Petitioner asked for a charge that life imprisonment was to be understood in its plain and ordinary meaning. Petitioner also requested a charge that the state had stipulated future dangerousness was not an issue in the sentencing proceeding. The court denied the latter request. JA 249-51.

The solicitor began his closing argument by again stating that the death penalty "fit the crime" in this case. JA 256. As he

recounted the various aggravating factors, such as kidnapping, burglary, and larceny or robbery with a deadly weapon, he noted that Petitioner had been "carrying out his plan". JA 257-58. When discussing the aggravating factor of physical torture, the solicitor reminded the jury that Petitioner's attack "was prolonged, unmerciful, intentional inflection of severe pain and abuse to another person". JA 259. The solicitor stated that the victim was fighting for her life, but that Petitioner was'"carrying out his plan". The solicitor concluded his discussion of physical torture:

> He was a master murderer. And not instantaneous, but prolonged, unmerciful, severe pain and abuse. All we've got to do is prove one [aggravating factor].

JA 259.

After addressing the aggravators, the solicitor responded to the mitigating factors of Petitioner's youth and lack of a violent criminal record by arguing that a person such as Petitioner "that commits an uncharacteristic and an unpredictable crime is more frightening than a serial killer" or a "career criminal", because, in an obvious reference to the fact that the victim knew Petitioner, "you kind of trust them a little bit". JA 260.

The solicitor then referred to Petitioner's plan to attack a female guard at the county jail, but reminded the jury that even though Petitioner did not have a prior violent record, "isn't [the murder of Shealy] bad enough on its own?". JA 261.

The solicitor next argued that Petitioner did not deserve mercy because he had shown none, by reminding the jury of the extreme brutality of the crime, as well as its premeditation, as evidenced by Petitioner's equipping himself with tape, a dagger,

and latex gloves. JA 262-67. As the solicitor described the crime's circumstances, he stated: "Keep on plunging, keep on slicing, hacking, bloody Billy, the butcher of Batesburg". The trial court sustained defense counsel's objection that the reference was inflammatory, but the solicitor continued, referring to Petitioner as "Billy the Kid", who committed a "man-sized crime" and deserved a "man-sized" punishment. The solicitor again called Petitioner the "butcher of Batesburg", but the trial court sustained the defense objection and ordered the comment stricken. JA 267-68.

Continuing his argument against mercy, the solicitor noted that Petitioner had no mental illness or retardation, and was intelligent and quick-witted. The solicitor then stated: "Doesn't that make somebody a little more dangerous –". Defense counsel objected that the solicitor was arguing future dangerousness, but the solicitor continued his thought before the court ruled:

> – for this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy. When you let your guard down and they stab you in the back.

There was no further objection. Referring to the victim's friendship with Petitioner's family, the solicitor concluded that Petitioner "made his own family victims", and noted that "we are talking about character and fitness". JA 269.

The solicitor then began discounting Petitioner's adaptability evidence, and reviewed the evidence of Petitioner's plans for escape. The defense objected that the solicitor was arguing future dangerousness, but the court overruled the objection. After the solicitor noted that as part of his aborted escape plan Petitioner called the female guard over to his cell while holding a shank behind his back, the solicitor stated:

> That's just shanks will be shanks. And murderers will be murderers. And he is the cold-blooded one right over there.

JA 270-72.

The solicitor next reviewed the victim impact evidence. In his closing thoughts, the solicitor again echoed themes of retribution, stating, "but if this case is not for the death penalty, if it's not right here, it's not right". JA 273-76.

During their closing arguments, defense counsel repeatedly stressed that Petitioner would be in prison for the rest of his life, even referring to such a sentence as a "slow death" as compared to the death penalty, which counsel characterized as "quick and painless". JA 276-80. Defense counsel concluded his argument by saying:

> I do believe the right thing in this particular case and the appropriate sentence is life in prison, a long time for somebody that's twenty-years old. A long, slow death. He'll never see the light of daylight again.

R. 2060.[1]

The judge defined life imprisonment by stating it should be understood in its plain and ordinary meaning. JA 289. The trial judge further instructed the jury that evidence of Petitioner's "prior crimes and misconduct" went only to the defendant's "character" and "characteristics", and could not be considered as proof of any statutory aggravating circumstances. JA 284. Later,

[1] This passage was designated by Respondent for inclusion in the Joint Appendix; however, it was omitted.

the trial court stated that the listed statutory aggravators (kidnapping, burglary, robbery or larceny with a deadly weapon, and physical torture) were the *only* aggravating factors the jury could consider. JA 292.

After the charge, defense counsel renewed her request for a charge from subsection 16-3-20(A), or, in the alternative, for a charge that the state had stipulated future dangerousness was not an issue. JA 304.

D. The South Carolina Supreme Court's resolution of the federal issue on direct appeal

On appeal, the state supreme court addressed Petitioner's claim that *Simmons* required a parole ineligibility charge because the prosecution raised future dangerousness with argument, and by presentation of "evidence about escape attempts, possession of a shank, and [Petitioner's] behavior in jail". *State v. Kelly*, 540 S.E.2d 851, 856 (S.C. 2001).

The court first held that the state's evidence did not raise future dangerousness. The court noted that evidence of misconduct in prison did not implicate the future dangerousness "contemplated by *Simmons*", which is danger if the defendant is released from prison. The court held that parole ineligibility did nothing to rebut the state's evidence that Petitioner was an escape risk. Finally, the court concluded that the state's evidence was directed towards showing Petitioner would not adapt to prison, and noted Petitioner had full opportunity to rebut this evidence with cross-examination and his expert witnesses on adaptability. *Kelly*, 540 S.E.2d at 857.

Next, the state supreme court held that the prosecution did not argue future dangerousness. The court observed that the solicitor "consciously avoided any implication of future

dangerousness", and never suggested that the jury "should impose the death penalty because [Petitioner] would be a future danger to the general public". *Kelly*, 540 S.E.2d at 857.

The *Kelly* court also went on to hold in the alternative that the *Simmons* rule was not triggered because at the time of the judge's charge a thirty year definite term sentence was a possibility, and life without parole was not the only available alternative sentence to death. *Kelly*, 540 S.E.2d at 857-58. This alternative rationale has since been overruled by this Court's decision in *Shafer v. South Carolina*, 121 S.Ct. 1263 (2001).

Finally, the state supreme court rejected Petitioner's claim that the trial court should have instructed the jury with eight-sentence request to charge that there was "no evidence" the defendant would be dangerous in the future, and that any consideration of future dangerousness was not a proper factor to consider. The state supreme court ruled the charge was properly denied, because (1) the prosecution was entitled to argue future dangerousness within prison without triggering the need for a *Simmons* instruction on parole ineligibility, and (2) "the charge as written is extremely confusing". *Kelly*, 540 S.E.2d at 859.

SUMMARY OF ARGUMENT

Since this Court decided *Simmons v. South Carolina*, 512 U.S. 154 (1994), South Carolina courts as well as the courts of other jurisdictions have held that its due process rationale did not apply unless the prosecution affirmatively raised future dangerousness as a basis for the death penalty. The South Carolina Supreme Court so held in Petitioner's case.

Petitioner now seeks to expand on years of interpretation and application of *Simmons*, initially by arguing that future dangerousness to society can be raised by mere presentation of the

defendant's other bad acts as well as the circumstances of the capital offense itself. Such a holding would make the future dangerousness to society requirement virtually meaningless and would conflict with the rationale of *Simmons* itself: a due process right of rebuttal.

Although evidence of prior criminal record, bad acts, premeditation, and grisly circumstances of the capital crime itself has been held on appeal to support a finding of future dangerousness to society in jurisdictions that expressly submit that issue to the jury, it does not follow that such evidence automatically flags the issue in the minds of South Carolina jurors, to whom the issue is not mentioned at all. It is the express submission of and argument of the issue before the jury that makes such "routine" capital trial evidence raise future dangerousness to society. Indeed, some states hold future dangerousness is not an appropriate matter for consideration; yet they still allow evidence of prior criminal record or circumstances of the crime without concern that the jury is improperly focused on the issue.

Thus, in order for a due process right of rebuttal to arise, the prosecution must affirmatively raise to the jury that the death of the defendant is the only way to ensure that society is protected. Future dangerousness to society is in issue if it is an expressly submitted aggravator, if the prosecution expressly argues it as a basis for death, or if the prosecution presents evidence for which there is no other inference but future dangerousness to society.

Mere argument and evidence of a defendant's other bad acts or the circumstances of his crime do not raise future dangerousness to society if the prosecution only uses them in the retributive context, that the defendant is undeserving of mercy because of what he has done. Retribution is a concept legally and

logically distinct from the concept of specific deterrence. Moreover, the state is entitled to introduce evidence of the defendant's other bad acts to prevent an overly generous view when the defense presents its inevitable Eighth Amendment mitigation case on the defendant's character and record.

Moreover, *Simmons* is only triggered by argument or evidence that the defendant poses a future danger to free society, not argument or evidence that he poses a danger to other inmates or prison staff. Parole ineligibility does nothing to rebut claims that the defendant will be dangerous in prison or will be an escape threat. Unless the point is expressly made, the jury will not necessarily assume future dangerousness to society from evidence or argument about dangerousness in prison; indeed, the evidence in Petitioner's case was that prison was causing him to misbehave. Further, evidence of and argument about the defendant's misconduct in prison does not trigger *Simmons* if it is limited to addressing the defense's adaptability case.

Unlike the prosecutor in *Simmons*, who characterized a death sentence as a "response of society" to a "threat", and an act of "self-defense", the prosecutor in this case did not assert that Petitioner's death was the only way to protect society. When the prosecutor's argument is viewed as a whole, it is clear that the passages of which Petitioner complains were part of a retributive argument that the defendant was undeserving of mercy for the acts that he had committed. The passages also responded to the mitigating factors of age and lack of a prior criminal record.

Even if the prosecution's case did raise future dangerousness, *Simmons* was not violated. Unlike *Simmons*, the jury in Petitioner's case did not inquire about parole eligibility, and the judge did not charge that parole was not for the jurors' consideration. Also, defense counsel repeatedly argued to the jury that Petitioner would "never see the light of daylight again"

if sentenced to life, which satisfied the mandate in *Simmons*. Since there is nothing to indicate the jurors were concerned with or confused about the possibility of early release, there is no reason to think that the jurors did not accept that the "plain meaning" of life imprisonment is imprisonment for life.

ARGUMENT

I. In order for the rule in *Simmons* to be triggered, future dangerousness to society must be expressly presented to the jury; parole ineligibility does not to rebut purely retributive arguments based on the circumstances of the capital crime or the defendant's other misconduct, nor does it rebut arguments or evidence that the defendant will be dangerous in prison.

In *Simmons v. South Carolina*, this Court held that due process prevented the state from creating "a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." 512 U.S. 154, 171 (1994). However, this Court has repeatedly said that, subject to the due process rule of *Simmons*, states retain "some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case". *Ramdass v. Angelone*, 120 S.Ct. 2113, 2119 & 2121 (2000) (citing *O'Dell v. Netherland*, 521 U.S. 151 (1997)). *See also Simmons*, 512 U.S. at 176 (O'Connor, J., concurring) (citing *California v. Ramos*, 463 U.S. 992, 1013 n. 30 (1983)).

Since *Simmons v. South Carolina* was decided, the South Carolina Supreme Court has held that life without parole instructions were not required where the prosecution did not expressly raise future dangerousness to society. *See State v.*

Williams, 468 S.E.2d 626 (S.C. 1996); *State v. Young*, 459 S.E.2d 84 (S.C. 1995); *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994).[2] Petitioner now challenges a similar holding in his case. Initially, however, he seeks to significantly broaden what will be deemed to have raised to future dangerousness to society, by primarily focusing on two points: (1) that introduction of and argument about the defendant's prior record and other bad acts necessarily raises future dangerousness to society, and (2) that introduction of and argument about the circumstances of the capital crime itself can raise future dangerousness to society.

A. Petitioner posits a test without standards and suggests an expansion of *Simmons*, with his argument that future dangerousness to society is raised merely by evidence and argument of prior bad acts or circumstances of the capital crime.

Evidently in reaction to Respondent's Brief in Opposition, Petitioner proposes in his brief the following test for determining whether future dangerousness to society is "in issue" for purposes of *Simmons*:

> (1) the prosecution presents evidence from which a jury could find the defendant poses a future danger,
>
> (2) the prosecutor's argument states or implies that the defendant poses a future danger,

[2] The South Carolina Supreme Court has also reversed cases for failure to give the instruction where it found the prosecution *did* raise future dangerousness to society. *See State v. Rogers*, 466 S.E.2d 360 (S.C. 1996) (prosecution argued "in our midst", and argued future dangerousness both inside prison and outside in society); *State v. Tucker*, 464 S.E.2d 105 (S.C. 1995).

> (3) the judge instructs the jury to consider the issue of future dangerousness.

Brief for Petitioner 28. Petitioner asserts his test represents no change to the *Simmons* rule.

However, Petitioner posits a test without standards, which would make this Court's opinions and seven years of Simmons's subsequent interpretation by other courts to be nothing but wasted breath and pointless endeavors. On one hand, Petitioner seems to provide a standard by requiring the prosecution "to present evidence from which the jury could find the defendant poses a future danger", on the other hand, he elsewhere asserts in his brief that "the facts of the capital murder *alone* may support a finding of dangerousness". Brief for Petitioner 24 (citing *Bell v. State*, 938 S.W.2d 35 (Tex. Crim. App. 1996)). He points to the "grisly [and] premeditated" nature of this crime as such a case. Brief of Petitioner 25. However, in South Carolina almost any death-penalty eligible crime would be far within the realm of one of the worst possible crimes; thus, under Petitioner's view, the simple presentation of the guilt phase case almost always would result in future dangerousness being "in issue".

If, as Petitioner suggests, by its facts alone almost every capital case necessarily involves future dangerousness to society, then *Simmons* would simply apply to every capital case where the only alternative sentence to death was life without parole. That has never been the law, and therefore Petitioner clearly suggests an expansion of *Simmons*. To the contrary, the opinions of this Court, whether in plurality, concurrence or in dissent, are generally clear that there is a meaningful future dangerousness to society requirement for triggering *Simmons*'s due process right of rebuttal. *See Ramdass v. Angelone*, 120 S.Ct. 2113, 2117 (2000) (plurality opinion) (noting that in *Simmons*, future dangerousness was in issue, so the plurality there concluded due process required

a charge on parole ineligibility); 120 S.Ct. at 2126 (O'Connor, J., concurring) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (Stevens, J., dissenting) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). *See also Simmons*, 512 U.S. at 163 ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant."); 512 U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . ."); 512 U.S. at 171 (Souter, J., concurring, joined by Stevens, J.) ("at least when future dangerousness is in issue . . . the defendant has a due process right" to a life without parole charge) 512 U.S. at 174 (Ginsburg, J., concurring) (noting that due process requires parole information "[w]hen the prosecution urges a defendant's future dangerousness as cause for a death sentence"); 512 U.S. at 176-77 (O'Connor, concurring) (noting that if prosecution does not "argue" future dangerousness, the state may decide parole is not a proper issue).[3]

Indeed, many decisions from other jurisdictions addressing the applicability of *Simmons* have identified the

[3] In his *Simmons* dissent Justice Scalia stated that Justice Blackmun's opinion "appears to go even further, requiring the admission of parole ineligibility even when the prosecutor does not argue future dangerousness". 512 U.S. at 183. While this may be true, it is clear that the other opinions set forth an express future dangerousness requirement for the due process rationale.

prosecutor's express argument of future dangerousness as a necessary trigger for applicability of the rule.[4]

Admittedly, there have been some older Texas cases that have found the prosecution's evidence insufficient to support the jury's finding of future dangerousness to society, which might suggest Petitioner's broad test does create an appropriate standard. If anything, however, these cases highlight what is typically present when the state expressly seeks to put on a future

[4] *See, e.g. People v. Musselwhite*, 954 P.2d 475, 509 (Ca. 1998) (although later assuming for argument that evidence could raise future dangerousness, distinguishing *Simmons* because the "prosecution did not argue the defendant's future dangerousness warranted the death penalty"); *People v. Coleman*, 660 N.E.2d 919, 941-42 (Ill. 1996) (distinguishing *Simmons* because "the state did not rely on future dangerousness in its argument to the jury as a reason for imposition" of death); *State v. Comeaux*, No. 93-2729, 699 So.2d 16 (La. 1997) (unpublished appendix to published opinion and available on WESTLAW) (distinguishing *Simmons* because the prosecutor did not argue "future dangers"); *State v. Feaster*, 716 A.2d 395, 440-41 (N.J. 1998) (distinguishing *Simmons* in part because "the prosecutor here did not specifically argue the future dangerousness"); *State v. Warren*, 499 S.E.2d 431, 455 (N.C. 1998) (distinguishing *Simmons*, and ruling that prosecutor did not argue future dangerousness, but instead argued "the evidence that defendant had committed three murders to show that defendant was a serial killer deserving of the death penalty"); *State v. Richmond*, 495 S.E.2d 677 (N.C. 1998) (argument of future dangerousness in prison does not trigger *Simmons*, and prosecutor was arguing defendant's past crimes when he stated that the people who get close to the defendant die); *State v. Mitts*, 690 N.E.2d 522, 529 (Ohio 1998) (in addressing claim where jury inquired whether life sentences would be consecutive or concurrent, distinguishing *Simmons* in part because the prosecutor did not argue future dangerousness); *Commonwealth v. Bridges*, 757 A.2d 859, 881 (Pa. 2000) (rejecting request for "*Simmons* instruction" on the basis that "the prosecutor did not argue Appellant's future dangerousness"); *Rhines v. Weber*, 608 N.W.2d 303, 311 (S.D. 2000) (distinguishing *Simmons* because prosecution did not expressly raise future dangerousness, with references to a "greedy killing", defendant's knowledge of how to use a knife, and "depravity of the mind" aggravator); *State v. Bush*, 942 S.W.2d 489, 503 n.7 (Tenn. 1997) (in dicta noting that case was unlike *Simmons* in that trial court did not allow prosecutor to argue future dangerousness).

dangerousness case. *See, e.g. Keeton v. State*, 724 S.W.2d 58 (Tex. Crim. App. 1987) (evidence did not support jury's finding of future dangerousness where there was no psychiatric evidence, no character evidence, and no evidence of prior violent acts); *Roney v. State*, 632 S.W.2d 598 (Tex. Crim. App. 1982) (evidence did not support future dangerousness where no psychiatric or prior record evidence was offered and circumstances of crime were not calculated and cold blooded); *Garcia v. State*, 626 S.W.2d 46 (Tex. Crim. App. 1982) (evidence did not support future dangerousness where crime was spontaneous, no prior record was introduced, and psychologist who testified lacked adequate foundation); *Wallace v. State*, 618 S.W.2d 67 (Tex. Crim. App. 1981) (where defendant was accomplice, evidence did not support future dangerousness where there was no evidence of prior convictions, prior acts of violence, or psychiatric testimony). If this is the standard, then future dangerousness to society would not be in issue *only* in those cases where there is no evidence of prior record and no evidence of premeditation or planning. Such a small subset of cases, for which it would be unlikely that a prosecutor in South Carolina would even seek the death penalty, would make the future dangerousness requirement, and this Court's discussion of it in *Simmons*, whether in plurality, concurrence, or dissent, to be much ado about nothing.

Moreover, cases from states that expressly submit a future dangerousness aggravator to the jury do not provide an accurate gauge of what evidence necessarily raises future dangerousness to society in the minds of South Carolina jurors. In Texas, the jury must expressly find future dangerousness to society as a necessary prerequisite to every death sentence. Tex. Crim. Proc. Code Ann. § 37.071(b), (g) (West 2001) (there must be "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). When making the determination of whether the defendant poses

a "continuing threat to society", a Texas jury is permitted to consider, *inter alia*:

> (1) the circumstances of the capital offense;
>
> (2) the calculated nature of the defendant's acts;
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> (3) the forethought and deliberateness exhibited by the crime's execution;
>
> (4) the existence of a prior criminal record, and the severity of prior crimes;
>
> (5) the defendant's age and personal circumstances at the time of the offense;
>
> (6) whether the defendant was acting under duress or the domination of another;
>
> (7) psychiatric evidence, and
>
> (8) character evidence.

Keeton, 724 S.W.2d at 61. The Texas appellate courts view the evidence *in the light most favorable to the verdict* when determining whether a rational trier of fact could have found future dangerousness to society. *Keeton*, 724 S.W.2d at 61.

Of course, determining whether a jury, under any view of the evidence, could have rationally found the future dangerousness aggravating factor that was expressly submitted to it, is a far cry from asserting, as Petitioner does here, that a jury *necessarily* would have focused on future dangerousness to society from similar evidence even though it was not expressly asked to do so. When one examines the *Keeton* factors as to what

in Texas could permissibly support a finding of future dangerousness, it is hard to conceive of many capital cases which would not at least have some evidence of one of those factors. Indeed, the number of reported cases in Texas that have not found sufficient evidence of future dangerousness are nearly imperceptible compared to the overwhelming amount cases that *have* found at least some sufficient evidence to support a jury's finding of future dangerousness. *See* cases annotated at note 45 of Tex. Crim. Proc. Code Ann. § 37.071 (West 2001).[5] It is the *express submission* and argument of the issue before the jury that makes "routine" types of sentencing phase evidence, such as prior record and circumstances of the crime, necessarily raise future dangerousness to society in the minds of the jury.

Therefore, what minimal evidence suffices under a highly deferential standard of review to support a jury verdict of future

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[5] Virginia requires the jury to find either vileness or a "probability" that the defendant would be a future danger to society, based on either his prior conduct or the circumstances surrounding the capital offense. Va. Code Ann. § 19.2-264.4 (Michie 2000). Respondent has been unable to locate any cases that have found insufficient evidence to support a finding of future dangerousness; indeed, the standard seems to be even easier to meet than in Texas. *See* cases annotated at section II(B) of Va. Code Ann. § 19.2-264.2 (Michie 2000); *Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000) (murder of employee to facilitate robbery and prevent identification was "strong evidence" of future dangerousness). A very low standard requiring only some evidence of a criminal past or of a "callous crime" is apparent from the cases of other states with express future dangerousness aggravators. *See* Cases annotated at note 6 of Okla. Stat. Ann. tit. 21, § 701.12 (West 2000); *Turrentine v. State*, 965 P.2d 955 (Okla. Crim. App. 1998) (to support aggravator, evidence must show participation in unrelated criminal acts, "callous" nature of the capital crime, or prior conviction for violence); *Marshall v. State*, 963 P.2d 1 (Okla. Crim. App. 1998) (holding victim underwater was sufficient to prove aggravator); Or. Rev. Stat. § 163.150 (1999); *State v. Tucker*, 845 P.2d 904 (Or. 1993) (future dangerousness aggravator authorizes jury to consider prior criminal conduct that is "broad in scope").

dangerousness is not the standard from determining what evidence would necessarily raise a "future dangerousness to society" issue in the minds of South Carolina jurors. If one were to apply such an "any evidence" standard, then the future dangerousness to society requirement in *Simmons* would be virtually illusory and meaningless. The focus should be on, as noted in *Simmons*, whether the prosecution expressly raised the issue to the jury.

B. For *Simmons*'s due process right of rebuttal to be triggered, future dangerousness to society must be expressly submitted to the jury through either prosecution argument, evidence, or the judge's charge.

Some sort of express submission of the issue to the jury is necessary because of the rationale of *Simmons*: a due process right of rebuttal. The idea is that "when the State seeks to show future dangerousness, . . . the fact that [the defendant] will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case". *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). *See also Simmons*, 512 U.S. at 164 (discussing that in *Skipper v. South Carolina*, 476 U.S. 1 (1986) due process required "admission of the defendant's relevant evidence in rebuttal"); 512 U.S. at 164-65 (discussing that in *Gardner v. Florida*, 430 U.S. 349 (1977), defendant was not allowed to rebut a presentence report used against him but not made available); 512 U.S. at 174 (Ginsburg, J., concurring) (if prosecution argues future dangerousness, defendant "must be afforded an opportunity to rebut the argument"). Obviously, in order to have a right to rebut a point, the other party must have first made it. It is *the use to which the prosecution puts the evidence* which triggers the rebuttal rule in *Simmons*. Otherwise, there is nothing to "deny or explain". *Gardner*, 430 U.S. at 362.

Respondent therefore identifies a rule with standards, and one which is consistent with *Simmons* as it presently exists as well as its subsequent interpretation by many lower courts. Future dangerousness is in issue when:

> (1) the statutory scheme requires the jury to make a finding of future dangerousness to society; or
>
> (2) the prosecutor expressly argues future dangerousness to society as a basis for death; or
>
> (3) the prosecution presents evidence for which there is no other inference other than future dangerousness to society.

Obviously, if the judge's charge requires the jury to decide whether the defendant is a continuing danger to society, then *Simmons* is triggered. South Carolina does not have an express statutory future dangerousness aggravator. S.C. Code Ann. § 16-3-20 (Supp. 2000). The issue in the present case lies with argument and evidence.

Express argument of future dangerousness to society does not simply result from references to the defendant's other bad acts, or to the gruesome circumstances of the capital crime. There is a discernable difference in both inference and effect between merely arguing, "this defendant deserves death because of all the bad things he has done in his life", or, "this defendant deserves death because of how horrible this particular crime was", as opposed to expressly raising the fear of future dangerousness to society by saying, "You must sentence this defendant to death to protect society, or he will kill again in the future". The former

arguments are only retributive; the latter is incapacitative. The two concepts are logically and legally distinct.[6]

Similarly, qualifying future dangerousness evidence would also be express, such as the defendant's statements that he will kill or harm others in society again, or expert mental health evidence that a defendant will likely be dangerous in the future. As with argument, there is a difference between merely introducing a defendant's other bad conduct or the circumstances of the crime to support retribution, and introducing evidence for which there is *no other possible inference* but future dangerousness to society. *Cf. generally Wisehart v. State*, 693 N.E.2d 23, 60 (Ind. 1998) (in Indiana, "a death sentence is imposed for what the defendant has done, not what he or she might do").

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[6] Arguing future dangerousness to society raises specific deterrence of the individual offender. *See Coleman v. Brown*, 802 F.2d 1227 (10th Cir. 1986); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985); *State v. Rose*, 451 S.E.2d 211 (N.C. 1994). *See also Gregg v. Georgia*, 428 U.S. 153, 183 & 183 n. 28 (1976) (stating, "[t]he death penalty is said to serve two principal social purposes: retribution and [general] deterrence", but noting that "another purpose that has been discussed is the incapacitation of dangerous criminals").

Retribution, on the other hand, involves the "belief that certain crimes are themselves so grievous and an affront to humanity that the only adequate response may be the penalty of death". *Gregg*, 428 U.S. at 184. The two concepts are obviously distinct. *See generally Harmelin v. Michigan*, 501 U.S. 957, 2704 (1991) (Kennedy, J., concurring) (noting that criminal systems have accorded varying weight at different times to various penological goals of retribution, deterrence, incapacitation, and rehabilitation); *State v. Warren*, 499 S.E.2d 431, 455 (N.C. 1998) (distinguishing *Simmons*, and ruling that prosecutor did not argue future dangerousness, but instead argued "the evidence that defendant had committed three murders to show that defendant was a serial killer deserving of the death penalty")

Indeed, the *Simmons* plurality implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)). *See also State v. Young*, 459 S.E.2d 84, 87 n.4 (S.C. 1994). Of course, the Eighth Amendment mandates that a defendant be allowed to present any evidence of his character or record that the jury may find is a basis for a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Typically, this mitigation evidence consists of reciting all the wonderful things the defendant has done in his life. *Cf. generally Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (quoting: "a parade of witnesses may praise the background, character and good deeds of Defendant without limitation as to relevancy"). The state similarly may present evidence of bad things the defendant has done, to prevent the jury from having a false perception of what kind of person the defendant has actually been. Such inferences do not raise future dangerousness.

A number of other jurisdictions have also noted the distinction between pointing out a defendant's character and other bad acts, and raising future dangerousness. *See, e.g. Allen v. State*, 662 So.2d 323, 331 (Fla. 1995) (prosecutor did not argue future dangerousness with reference to prior escape; argument went to "committed by person under sentence of confinement" aggravator); *Parker v. State*, 456 So.2d 436 (Fla. 1984) (prosecutor's reference to defendant's prior life with parole sentences did not raise future dangerousness but merely argued aggravator of prior violent record); *State v. Bey*, 736 A.2d 469 (N.J. 1999) ("prior murder" aggravator did not raise future dangerousness); *State v. Warren*, 499 S.E.2d 431, 455 (N.C. 1998) (distinguishing *Simmons*, and ruling that prosecutor did not argue future dangerousness, but instead argued "the evidence that

defendant had committed three murders to show that defendant was a serial killer deserving of the death penalty"); *State v. Bey*, 709 N.E.2d 484 (Ohio 1999) (prosecutor did not raise future dangerousness by reviewing evidence of defendant's character, background, and history in response to adaptability evidence); *Commonwealth v. May*, 710 A.2d 44, 47 (Pa. 1998) (evidence of prior criminal conduct does not necessarily raise future dangerousness); *Rhines v. Weber*, 608 N.W.2d 303, 311 (S.D. 2000) (distinguishing *Simmons* because prosecution did not expressly raise future dangerousness, with references to a "greedy killing", defendant's knowledge of how to use a knife, and "depravity of the mind" aggravator). Moreover, there are many types of evidence known to law which are admitted for one purpose but not another. *See, e.g.* Fed. R. Evid. 404(b) (other bad acts); Fed. R. Evid. 803(3) (state of mind).[7]

Respondent certainly concedes that other jurisdictions as well as this Court have noted that evidence of other criminal acts can be indicative of future dangerousness. Again, however, it is the use to which the prosecution puts the evidence which triggers a due process right to rebut. If the prosecution argues that the defendant's record indicates he will always be a danger to society unless he is put to death, then the evidence *plus the argument* clearly triggers *Simmons*'s right to rebut. If, however, the prosecution only argues that the defendant is undeserving of mercy for the severity and quantity of his criminal acts, then future dangerousness has not been raised. Unlike the "elusive"

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[7] Petitioner may note in reply that often such evidence is accompanied by a limiting instruction, and the trial court in this case rejected the defense request that the jury be charged that there was "no evidence" the defendant would be dangerous in the future". The state supreme court ruled the charge was properly denied, holding (1) that the prosecution was entitled to argue future dangerousness within prison without triggering the need for a *Simmons* instruction on parole ineligibility, *see* section I(C), *infra*, and (2) that "the charge as written is extremely confusing". *Kelly*, 540 S.E.2d at 859.

distinction between future adaptability to prison and past behavior in prison rejected by *Skipper* in an Eighth Amendment context, 476 U.S. at 6, specific deterrence is clearly distinct both logically or legally from retribution.

C. *Simmons* is not triggered by prosecution argument as to a defendant's future dangerousness to other inmates and prison staff, because information about the unavailability of parole does nothing to rebut such a claim.

The South Carolina Supreme Court ruled that evidence of and argument about Petitioner's misconduct while in pretrial detention did not trigger *Simmons*, because the unavailability of parole does nothing to rebut evidence showing Petitioner's future dangerousness *while in prison*. *Kelly*, 540 S.E.2d at 857. Petitioner contends that there is no basis in law or logic for the "inside prison/outside society" distinction. He is incorrect.

As noted before, the *Simmons* rule is based in the due process right of a capital defendant to rebut the state's presentation of future dangerousness as a basis for death. 512 U.S. at 164-65 (discussing *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Gardner v. Florida*, 430 U.S. 349 (1977)). The rationale is obvious for distinguishing between argument about future dangerousness to the public, which would trigger *Simmons*, and argument about dangerousness while inside prison, which would not: whether or not the defendant may be released from prison on parole is irrelevant if the prosecutor is only arguing that the defendant will be dangerous to other inmates and prison staff. Since life without parole does absolutely nothing to respond to dangerousness inside prison, there is no corresponding due process right of rebuttal.

Despite its obvious logic, this distinction finds support in *Simmons* itself as well as the decisions of other jurisdictions. *See Simmons*, 512 U.S. at 165 n.5 ("Of course, the fact that a defendant is parole ineligible does not prevent the state from arguing that the defendant poses a future danger. The state is free to argue that the defendant will pose a danger to . . . inmates or prison staff.") (plurality); 512 U.S. at 177 ("Of course, in such cases the prosecution is free to argue that the defendant would be dangerous in prison.") (concurrence).

Petitioner contends that these passages only mean that the prosecution may continue to argue future dangerousness inside prison even though a parole ineligibility charge is given. Whatever merit Petitioner's interpretation may have from the way the above passages were phrased in *Simmons*, this does not change the obvious logic that ineligibility for parole does nothing to rebut future dangerousness to other inmates and prison staff. If, as noted by both Justices Blackmun and O'Connor, an ineligibility for parole charge does nothing to preclude the relevance of prosecution arguments that the defendant would be dangerous in prison, then the opposite is also true, that prosecution arguments about the defendant's future dangerousness in prison do nothing to make relevant the defendant's ineligibility for parole. *Cf. Ramdass v. Angelone*, 120 S.Ct. 2113, 2122 (2000) (parole ineligibility charge can be overcome if jury concludes defendant may pose risk to society in prison).

In any event, the importance that the prosecution argued future dangerousness to society is readily apparent from the plurality and concurring opinions, even though Justice Scalia's dissent states Justice Blackmun's opinion may "appear" not to require future dangerousness argument to trigger *Simmons*. First, both the plurality and concurrence focused on the prosecution's argument that the jury must decide "what to do with [Simmons]

now that he is in our midst", and that a death sentence would be "a [self-defense] response of society to someone who is a threat". 512 U.S. at 157. Both the plurality and the concurring opinions made much of the testimony in *Simmons* that the defendant was only dangerous to elderly women and thus would not pose a threat to the men in prison. 512 U.S. at 157-58, 176.

Second, the plurality opinion defined future dangerousness argument as "urg[ing] the jury to sentence the defendant to death so that he will not be a danger to the public *if released from prison*". *Simmons*, 512 U.S. at 163 (emphasis added). Indeed, the *Simmons* plurality noted its due process concern was that "there may be no greater assurance of a defendant's future nondangerousness *to the public* than the fact that he never will be released on parole". Id. at 164 (emphasis added). Justice Blackmun noted that the state raised future dangerousness "generally", but then "thwarted" the defendant's efforts to show that his parole ineligibility prevented him from "pos[ing] a future danger *to society*". *Simmons*, 512 U.S. at 165. Similarly, Justice O'Connor stated that due process required an ineligibility charge if life without parole was the only alternative sentence and "the prosecution argues that the defendant will pose a threat to society in the future". *Simmons*, 512 U.S. at 177. Finally, the significance to this Court's decision that the prosecutor in *Simmons* raised future dangerousness to society rather than merely inside prison is highlighted by the discussion in Justice Scalia's dissent. 512 U.S. at 180-82 (arguing that the majority was incorrect in concluding that "future dangerousness outside of prison" was raised by the prosecutor in *Simmons*).[8]

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[8] Indeed, at the trial level in *Simmons* itself, the defense, whose lawyers included Petitioner's present counsel, asked that since the judge had declined to charge parole ineligibility, the prosecutor should be precluded from arguing "the defendant will pose a risk of future violent behavior to society" unless sentenced to death. *Simmons* JA 55.

Other jurisdictions have also applied or recognized the distinction between inside prison and outside society future dangerousness evidence or argument. *United States v. Flores*, 63 F.3d 1342, 1368 (5th Cir. 1995) (focus on danger in prison makes case "materially different" from *Simmons*); *Allridge v. Scott*, 41 F.3d 213, 221-22 n.12 (5th Cir. 1994) (parole ineligibility irrelevant if prosecution is arguing defendant is dangerous to both society and prison); *State v. Richmond*, 495 S.E.2d 677 (N.C. 1998) (rule in *Simmons* is not triggered by arguments of dangerousness in prison; that dangerousness exists apart from eligibility for parole); *Collier v. State*, 959 S.W.2d 621, 623 (Tex. Crim. App. 1997) (en banc) (since jury considers both danger to free society as well as prison in "continuing threat" aggravator, length of incarceration does not reduce dangerousness).

Petitioner responds to the logic of this distinction by contending evidence that Petitioner was dangerous inside the highly restrictive environment of prison is *necessarily* evidence that Petitioner would be more dangerous in the free climate of society, regardless of how the prosecution argues the evidence. Surely, prison is a more restrictive environment than society; however, it is common sense that a prison for felons is a far more dangerous and violent place than the Petitioner's small hometown of Batesburg, South Carolina, or most any other neighborhood in the country. It cannot simply be assumed that people necessarily behave *better* in a maximum security lockup than they would in free society. The South Carolina Supreme Court was thus correct in concluding that such evidence went to show Petitioner was not adaptable to prison, and not to prove his future dangerousness to the general public. *See Kelly*, 540 S.E.2d at 857.

Indeed, Petitioner's contention in this regard *contradicts* the very evidence he presented in mitigation in this case. The defense presented expert evidence that Petitioner's possession of a shank, talk of escape, and drawing of a decapitated chicken on

his cup was just the typical "puffing" often done by younger, smaller-built inmates. JA 178-93. During the defense's cross-examination of the state's penalty phase witnesses, the *defense* brought out that inmates have to stand up for themselves in prison by fighting, that inmates often have shanks to protect themselves, that prison is a "dog eat dog" world, and that an inmate must always "watch his back". Moreover, the *defense* established through cross-examination that inmates are going to constantly test each other, and if an inmate does not show he is tough, he will end up "becoming someone's boyfriend" or cleaning another inmate's room. JA 136-38, 142-44, 149-51; R. 1766-67. Thus, the mitigation evidence was that prison was *causing* Petitioner to behave more violently than he normally would, not that its more restrictive environment caused him to behave. Prison and free society are vastly different and the link is not so readily made.

Finally, another reason exists why the prosecution's evidence of and argument about the defendant's misbehavior in prison in not a trigger for *Simmons*'s rule. In *Skipper v. South Carolina*, a majority of this Court held that a capital defendant has a Eighth Amendment right to present evidence of his adaptability to prison, as well as a due process right to present such evidence if the prosecution "specifically relies" on his future dangerousness in prison. 476 U.S. 1 (1986). The prosecution's presentation of evidence and argument about Petitioner's misbehavior while in pre-trial detention therefore goes to counter the inevitable defense adaptability case in mitigation. Said another way, the evidence and argument address the defendant's *Skipper* case that he is adaptable to prison, not raise under *Simmons* the defendant's future dangerousness to society. The South Carolina Supreme Court correctly so held. *Kelly*, 540 S.E.2d at 857.

Specific discussion is warranted here on evidence of escape attempts. Like any other bad act, escape is probative of

the prosecution's arguments in favor of retribution. Moreover, evidence of escape attempts is permissible given the inevitable defense case to show *Skipper*-style adaptability to prison. Most importantly, however, a defendant's parole ineligibility does nothing to rebut the fear that he may be an escape risk. *See Kelly*, 540 S.E.2d at 857. *See also Ramdass*, 120 S.Ct. at 2122 (evidence of parole ineligibility is of "uncertain materiality", in that it may be "overcome if a jury concludes that even if the defendant might not be paroled, he may escape to murder again"). *See generally State v. Singleton*, 326 S.E.2d 153 (S.C. 1985) (inmate on work assignment murders woman); *State v. Middleton*, 339 S.E.2d 692 (S.C. 1986) (inmate escapes from work detail and murders two women).

Since parole ineligibility does not rebut evidence or argument about Petitioner's misbehavior in prison, the South Carolina properly ruled that such evidence or argument does not trigger the *Simmons* rule.

D. It is not inappropriate for prosecutors to decide as a tactical matter whether or not to raise future dangerousness to society.

Petitioner seems to imply something untoward exists if prosecutors in South Carolina are allowed to make a "tactical decision" whether to raise future dangerousness to society and accept a *Simmons* instruction, or whether to not raise the issue and consequently avoid injecting parole considerations into the proceedings. First, as noted before, such a decision is expressly sanctioned in the *Simmons* concurrence. 512 U.S. at 176-77 (O'Connor, J., concurring) (if prosecution does not argue future dangerousness, state may decide that parole is not a proper

consideration for the jury even if the only alternative sentence is life without parole).[9]

Secondly, however, the prosecution does not achieve an unfair tactical advantage with such a decision; Petitioner overlooks that by avoiding express arguments and evidence of future dangerousness to society, a prosecutor gives up a significant arrow in his or her quiver which could attack mitigation and support a sentence of death.

Finally, there is no requirement that future dangerousness to society be an issue in every capital sentencing proceeding; indeed, some states prohibit jury consideration of future dangerousness as an aggravator. *See Teffeteller v. State*, 439 So.2d 840, 845 (Fla. 1983) ("no place" in Florida jurisprudence for [future dangerousness] argument); *Wisehart v. State*, 693 N.E.2d 23, 60 (Ind. 1998) (improper for prosecutor to argue future dangerousness as it is not a valid aggravating factor); *State v. Koskovich*, 776 A.2d 114 (N.J. 2001) (future dangerousness is not an aggravator in New Jersey). These states allow, however, evidence and argument on a defendant's prior record and the circumstances of the crime without concern that the jury necessarily must be focusing on the prohibited non-statutory aggravator of future dangerousness to society. *See, e.g. Allen v. State*, 662 So.2d 323, 331 (Fla. 1995) (prosecutor did not argue future dangerousness with reference to prior escape; argument went to "committed by person under sentence of confinement" aggravator); *Parker v. State*, 456 So.2d 436 (Fla. 1984) (prosecutor's reference to defendant's prior life with parole

[9] *See also Skipper*, 476 U.S. at 11 (Powell, J., concurring) (state could exclude evidence of defendant's post-arrest good behavior as long as not offered to rebut evidence or argument of defendant's future dangerousness in prison or non-adaptability to prison life).

sentences did not raise future dangerousness but merely argued aggravator of prior violent record).

Accordingly, even if prosecutors do make tactical decisions whether or not to raise future dangerousness, there is nothing unfair about such a practice. Either way, the defendant has not been prevented from denying or explaining information offered as a basis for death. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

II. The prosecution in Petitioner's case did not expressly raise future dangerousness to society but rather focused on retribution.

There is no question that the prosecution introduced evidence that Petitioner misbehaved in prison, talked of and planned escape attempts, was in a cell where someone was removing mortar from around the bricks, possessed a shank, and jokingly bragged about his crime. The state also highlighted the exceptionally grisly consequences of Petitioner's handiwork in murdering Shirley Shealy. Assuming this Court accepts the proposition, argued previously, that mere introduction of other bad acts, misconduct in prison, or grisly circumstances of the capital crime itself does not alone put future dangerousness in issue, then *Simmons* was not triggered by the evidence set forth above. The crucial question in this case is whether the solicitor's argument on that evidence entered within the realm of arguing future dangerousness to society.

When the prosecutor's argument is viewed as a whole, it is clear his main theme was retribution: death was the only appropriate sentence for Petitioner's crime. On multiple occasions the prosecutor told the jury that death was the punishment that fit the crime. JA 68, 256, 261, 275. As argued above, retribution is distinct from arguments of specific

deterrence, and does not implicate future dangerousness to society.

The prosecutor did repeatedly argue to the jury that Petitioner's crime was premeditated and planned. However, this was amply supported in the evidence, in that Petitioner used to work for Shealy at the KFC, knew her well, was aware the night deposits were in the safe and Shealy had the key, hid in the backseat of her car after hours, and carried gloves, a knife, and duct tape to the crime. Such arguments were entirely retributive and not in the context that Petitioner's premeditation against Shirley Shealy indicated he would pose a future danger to society.

The prosecution also highlighted the grisly circumstances of Petitioner's crimes. Again, however, they were argued to show Petitioner did not deserve mercy for his crime, and to support the statutory aggravating factor of physical torture. S.C. Code. Ann. § 16-3-20(C)(a)(1)(h) (Supp. 2000).

A. "Doesn't that make somebody a little more dangerous [to the victim]?"

Petitioner discusses portions of the testimony and prosecution's closing argument which deserve specific mention. Brief for Petitioner 18-20. Petitioner first points to the following statement of the prosecution in argument:

> SOLICITOR: Mercy? Mitigation? If you find it, folks, speak it out for what he's done. And, you know what, what did his own witness say. He doesn't have any mental illness. He's intelligent. He's not retarded. He's quick-witted. *Doesn't that make somebody a little more dangerous—*

> DEFENSE ATTORNEY: Objection, Your Honor.
>
> THE COURT: Just a moment. Yes, ma'am. State your grounds.
>
> DEFENSE ATTORNEY: The Solicitor has stipulated dangerousness is not an issue—
>
> SOLICITOR: *—For this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy.* When you let your guard down and they stab you in the back. That's what we have here. That's what we do know. That's what he did. He made his own mother admit that. He made his own family victims.

JA 268-69 (emphasis added).

There is nothing to support Petitioner's contention that the solicitor momentarily forgot to avoid future dangerousness to society; if anything, it just as readily appears that defense counsel's objection cut the solicitor short before he had a chance to finish his thought. In any event, the solicitor *immediately* tied his "dangerous" comment into the particular crime committed against Shealy. The statements were part of the solicitor's argument that Petitioner facilitated his plan of robbery and murder by preying on Shirley Shealy, a good friend of his family likely to trust him, which made him more dangerous *for her*. Such a contention is purely retributive, that the circumstances of Petitioner's crime precluded mercy. The solicitor also was pointing out that Petitioner was under no mental illness or mental deficiency which might mitigate his callous premeditation. These statements were fair comments on the evidence and did not raise

future dangerousness. *See generally Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing).

B. "Bloody Billy, the butcher of Batesburg"

Petitioner next complains about how the solicitor referred to him during argument. The solicitor had been arguing that Petitioner did not deserve mercy because he had shown none, by reminding the jury of the extreme brutality of the crime, as well as its premeditation, as evidenced by Petitioner's equipping himself with tape, a dagger, and latex gloves. JA 262-67. As the solicitor described the crime's circumstances, he stated: "Keep on plunging, keep on slicing, hacking, bloody Billy, the butcher of Batesburg". The trial court sustained defense counsel's objection that the reference was inflammatory, but the solicitor continued:

> But they want you to think of him as Little Billy. Little Billy, the kid. I know another Billy, the kid, that he reminds me of. He's not a kid. He's a killer. And he committed a man-sized crime and he needs a man-sized punishment.

JA 268. The solicitor again called Petitioner the "butcher of Batesburg", but the trial court sustained the defense objection and ordered the comment stricken. JA 267-68.

The statement "Bloody Billy, butcher of Batesburg" in no way reflected on future dangerousness but merely emphasized the brutal nature of Petitioner's crimes. It followed the solicitor's graphic description of the attack on Shealy. JA 263-67. Whether the reference was inflammatory is not an issue on appeal. However, the statement was based in the evidence, because the crime was exceptionally bloody, and Petitioner stabbed Shealy so

repeatedly and deeply that "butchering" is a fair word. *Cf. United States v. Pungitore*, 910 F.2d 1084 (3rd Cir. 1990) (reference to defendants as "cold-blooded killers" and "mob killers" fair comment on the evidence). The statement referred to the crime Petitioner had already committed and did not raise future dangerousness. *See generally Donnelly v. DeChristoforo, supra.*

The prosecutor's reference to "Billy the Kid" also clearly was part of an argument against the mitigating factor of age, in that Petitioner was not a child but deserved a "man-sized punishment" for his crime. *See Simmons*, 512 U.S. at 181-82 (Scalia, J., dissenting) (argument did not raise future dangerousness but was part of response to mitigating factors). Such an argument is obviously retributive, and the passing reference to a western outlaw surely could not have so easily flagged future dangerousness to society in the jury's mind. *See generally Donnelly v. DeChristoforo, supra.*

C. "Murderers will be murderers."

Petitioner next mentions portions of the solicitor's discussion on Petitioner's behavior in jail. After stating that Petitioner had learned from his "mentor," jailhouse informant Matthew McCormack, the solicitor commented on the fact that Petitioner did not report the digging of the mortar around a cell's cinder block. The following then occurred:

> SOLICITOR: Oh, no. He doesn't have anything to do with it and that toothbrush he had with the metal tip in it, oh, that's just being a big man, to clean his fingernails. That's not to hurt anybody, not Ms. Marsha Price, the lady everybody says—

DEFENSE ATTORNEY: Objection, Your Honor. He's — I think he's going afield to what we stipulated to on the future problems.

SOLICITOR: I am talking about—

THE COURT: Solicitor, if you would, please limit your argument to what we discussed, sir.

SOLICITOR: I am talking about what happened from the witnesses who testified on this stand. And didn't you hear a woman named Marsha Price who worked at the Lexington County Jail. Didn't they say that she was the one most gullible, the one you could take hostage? Didn't you hear he had that shank behind his back calling her to the door—

DEFENSE ATTORNEY: Objection, Your Honor—

SOLICITOR: —If you didn't hear that, disregard it—

DEFENSE ATTORNEY: This is going outside the scope of the situation.

THE COURT: Overruled—

DEFENSE ATTORNEY: —Stipulation—

THE COURT: Overruled.

SOLICITOR: If you didn't hear somebody testify to that, folks, you hold it against me and not

against the family out here, please. But I swear I heard that from the stand. But you take it as you heard it. That's just shanks will be shanks. And murderers will be murderers. And he is the cold-blooded one right over there.

JA 270-72.

The state supreme court correctly found that the statements did not address future dangerousness to society as a whole. *Kelly*, 540 S.E.2d at 857. The "murderers will be murderers" statement clearly related to Petitioner's plan to take a guard hostage while in pretrial detention. Assuming the statement did raise future dangerousness, it went solely to Petitioner's future dangerousness in prison and lack of adaptability to prison life, which, as argued before, does not trigger *Simmons*.

D. "More frightening than a serial killer . . ."

Petitioner next points to the following argument:

SOLICITOR: No prior convictions of violence against another person; below the age of eighteen. You know something, a person that commits an uncharacteristic and an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal. Is that person un-characteristicall [sic], because he hadn't done it before? You kind of trust them a little bit.

Unpredictably because of his age. You don't think they will do anything. Those people are supposed to be kind, supposed to be your friend, supposed to be nice; supposed to be kind.

> Well, that's the kind that while they are hugging you with kindness, they're getting ready to kill you with kindness. Does that go in his favor—

JA 260-61.

This argument was the solicitor's challenge to the mitigating factors of the defendant's age and lack of a prior violent record. Indeed, rather than say Petitioner was a future danger, the solicitor called his crime uncharacteristic, and thus expressly recognized the obvious: that Petitioner was not a career criminal or serial killer. The solicitor was merely arguing about the circumstances of Petitioner's crime, that he stalked and killed a close family friend who would have been more trusting and vulnerable. The solicitor went on to say that such a circumstance made Petitioner's crime "bad enough on its own" that the lack of a prior record should not preclude the death penalty. JA 261. The argument merely highlighted the Petitioner's premeditation in a retributive manner, which does not raise future dangerousness to society. The state supreme court correctly so found. *Kelly*, 540 S.E.2d at 857.

E. Cross-examination on reports in Petitioner's mental health records

Finally, Petitioner asserts the prosecution raised future dangerousness with the solicitor's cross-examination of defense experts on reports in Petitioner's mental health records that he obsessively thought of killing people "who pissed him off", and that he had a history of torturing and killing small animals. JA 194-99, 218. At either trial or direct appeal, Petitioner did not assert this cross-examination as a reason why the prosecution had raised future dangerousness to society. The state supreme court did not address this cross-examination in either its description of the facts or its resolution of the *Simmons* issue. *Kelly*, 540 S.E.2d

at 857. The state appellate court never had an opportunity to address this cross-examination. *State v. Sullivan*, 282 S.E.2d 838 (S.C. 1981) (issue not argued in the brief cannot be considered on appeal); *State v. Thomas*, 156 S.E.2d 169 (S.C. 1930) (issue not ruled upon by the trial judge is not preserved for appeal). Therefore, consideration of it is not preserved for review before this Court. *See Bailey v. Anderson*, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, the defense stated the witness's only purpose was to testify as to adaptability to prison, and when the cross-examination is read in context, it is clear it was directed towards challenging the witness's adaptability opinion. R. 1935, 1926-59. The defense first raised the issue during direct examination, by eliciting that Petitioner's talk of violent fantasies and escape was just typical "big talk" often seen from younger, smaller-built, and thus more vulnerable inmates. JA 191. The defense also elicited on direct that Petitioner had no real history of violence, that he was finding "creative ways to avoid violence" in jail, and that he was not dangerous in prison. JA. 181-88, 191-92. The prosecution then was certainly entitled to explore whether Petitioner's violent fantasies and past torturing and killing of small animals affected the witness's expert opinion on Petitioner's adaptability and mental illness. The prosecution cannot be viewed as having raised future dangerousness to society as a basis for death, or the defense have a due process right to rebut something that the prosecution raised, when the prosecution merely cross-examined the defense's mental health expert on how

relied-upon information in the mental health records affected the expert's opinion.[10]

Further, most of the cross-examination focused on Petitioner's possession of a shank, plan to take a guard hostage, and Petitioner's likely experience in prison. R. 1927-59. The prosecution during argument never mentioned or "used" the reports of Petitioner's obsessive thoughts of killing people or reports of his history of torturing and killing small animals. Thus, this situation is unlike that in *Simmons*, where the prosecution on cross-examination specifically asked and got the defense expert to admit that the defendant was dangerous, and then pointed that testimony out again as part of a specific deterrence argument to the jury. *Simmons* JA 91-92, 102. Here, the mere passing reference to obsessing about killing in the context of the entire cross-examination, and indeed the entire trial, would not have flagged the issue in jury's mind such that due process required a parole ineligibility charge.

In *Simmons*, the prosecutor asked the jury to be "concerned about what to do with [the defendant] now that he is within our midst". The prosecution there contended:

> Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense.

---

[10] Indeed, as a technical matter there was no substantively admissible evidence of Petitioner's obsessiveness at all; thus, the prosecution did not "present" any such evidence. *See* Rule 802, SCRE (hearsay); *United States v. Madrid*, 673 F.2d 1114 (10th Cir. 1982) (admission of hearsay evidence under Rule 703 is considered solely as basis for expert's opinion and not as substantive evidence). *See generally State v. Hutto*, 481 S.E.2d 432 (S.C. 1997) (discussing Rule 703, SCRE).

512 U.S. at 182. Even those statements created division among the members of this Court as to whether they raised future dangerousness. The prosecution in *Simmons* even went on to argue that "whether or not the sentence of death for Jonathan Simmons will deter anybody else, I submit to you that the fact that it will deter him is plenty", and pointed out that the defendant's own expert called him dangerous. *Simmons* JA 102.

The prosecution here never even got close to such statements; at best, Petitioner can take isolated passages out of context. Since there was nothing presented which required rebuttal with evidence of parole ineligibility, there was no violation of due process.

III. Since the jury never inquired about parole and the trial judge did not broach the issue by giving a "no concern" charge, *Simmons* was satisfied by the judge's plain meaning instruction and the defense's argument to the jury that Petitioner would never leave prison.

Two important factors distinguish Petitioner's case from that in *Simmons*, and even *Shafer*, for that matter. First, unlike those cases, the jury in Petitioner's case did not inquire about parole eligibility. Thus, there is nothing whatsoever to indicate that the jurors were concerned at all with the possibility of Petitioner's future release when they decided death was appropriate. *Cf. Shafer v. South Carolina*, 121 S.Ct. 1263, 1273-74 (2001). Second, unlike *Simmons* and *Shafer*, the jurors in this case were not charged that parole eligibility or ineligibility was not for their consideration. *Cf. Simmons*, 512 U.S. at 170-71; *Shafer*, 121 S.Ct. at 1274. Thus, there is no reason to think that the jurors were told parole was available, but "for some unstated reason, [they] should be blind to that fact". *Simmons*, 512 U.S. at 170. If anything, they heard testimony that goodtime reduction was not a possibility for Petitioner. JA 236-37.

Three Justices in *Simmons* stated that its mandate would be satisfied if the defendant's parole ineligibility is presented to the jury through *either* an instruction from the court or argument of defense counsel. 512 U.S. at 169, 174, 177.[11]

In her sentencing phase opening statement, Petitioner's counsel told the jury that their recommendation would be "the sentence actually imposed and the sentence that will actually be carried out". R. 1660. In sentencing phase closing, Petitioner's counsel repeatedly told or implied to the jury that Petitioner would never leave prison if he received a life sentence. Petitioner's counsel said that "a wife and a kid and car" would "never happen for Billy Kelly, ever", that life in prison was a "horrible", "severe" and "true" punishment, and that "life in prison is worse than [the death penalty] because it's a slow death". Counsel concluded his argument by saying:

> I do believe the right think in this particular case and the appropriate sentence is life in prison, a long time for somebody that's twenty-years old. A long, slow death. He'll never see the light of daylight again.

R. 2060 lines 7-12; JA 276-80. When combined with the judge's charge that life imprisonment was to be understood in its plain meaning, the defense arguments prevented the jury from being faced with the "false dilemma" condemned by *Simmons*. 512 U.S. at 171. Since there is no reason to think that the jurors did not accept that the "plain meaning" of life imprisonment is

---

[11] In *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994), *overruled on the grounds in State v. Chapman*, 454 S.E.2d 317 (S.C. 1995), the South Carolina Supreme Court held that trial courts had to give life without parole instructions if the *Simmons* was triggered. However, the issue before this Court in the present case concerns only the federal constitutional mandate in *Simmons*, and not any purely state law expansion of the rule.

imprisonment for life, the judge's charge and defense argument satisfied due process, regardless of whether the prosecution raised future dangerousness.

IV. South Carolina may remain true to its state law rule that disfavors introduction of collateral circumstances such as parole, as long as the state honors the due process rule of *Simmons* in the limited situations to which it applies.

Subject only to the due process rule of *Simmons*, states retain "some discretion in determining the extent to which a sentencing jury should be advised of probable future custody and parole status in a future dangerousness case". *Ramdass v. Angelone*, 120 S.Ct. 2113, 2119 & 2121 (2000). South Carolina has long reasoned that since the jury's only responsibility is "to determine in the first instance whether punishment should be life or death", the jury should not "speculate on the possible effect of pardon or parole", or concern itself with "the time, place, manner, and conditions of execution or incarceration". *See, e.g. State v. Torrence*, 406 S.E.2d 315, 322-23 (S.C. 1991). Indeed, even a defendant sentenced to life without parole under South Carolina's murder statute could still benefit from pardon or clemency. *See* S.C. Code Ann §§ 24-21-920 to -1000 (1977 & Supp. 2000). Moreover, a parole ineligibility charge is of "uncertain materiality", and can be overcome if a jury concludes the defendant may escape, be pardoned, benefit from a change in state laws, or be dangerous to society in prison. *Ramdass*, 120 S.Ct. at 2122. South Carolina seeks to avoid introduction of such collateral concerns into the sentencing proceeding. As long as South Carolina does not prohibit defendants from using their parole ineligibility for rebuttal when it is relevant, that is, when prosecutors make a case for death by affirmatively raising future dangerousness to society, then South Carolina may remain true to its state law rule.

In this case, the prosecution did not expressly assert that Petitioner would be dangerous to society in the future, nor was it a necessary inference from the evidence. There is no indication that the jury was concerned with or confused about Petitioner's parole ineligibility, and defense counsel made the point that Petitioner would never leave prison if sentenced to life. The South Carolina Supreme Court correctly concluded that Petitioner's due process rights were not violated.

CONCLUSION

For the foregoing reasons, this Court should affirm the South Carolina Supreme Court's decision upholding Petitioner's sentence for the murder of Shirley Shealy.

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In The

Supreme Court of the United States

WILLIAM ARTHUR KELLY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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ARGUMENT IN REPLY

1. The state's proposed standard would effectively overrule *Simmons*.

South Carolina concedes that the state's evidence alone can, under some circumstances, place future dangerousness "at issue" under *Simmons v. South Carolina*, 512 U.S. 154 (1994). Brief for Respondent at 15, 26. It further acknowledges that the prosecution's evidence of petitioner's violent character and behavior was more than sufficient to prove his future dangerousness beyond a reasonable doubt, had South Carolina law permitted or required the jury to make such an explicit finding. Brief for Respondent at 18-25. Nevertheless, the state insists that its evidence did not place petitioner's future dangerousness at issue because he has not shown that the jury could have drawn *"no other possible inference* but future dangerousness to society" from the state's proof. *Id.* at 27 (emphasis in original).

This "dangerousness-only" standard, if adopted, would mean that most evidence of future dangerousness would fail to trigger the *Simmons* rule, since such evidence is usually also relevant to the separate issue of the defendant's moral desert. Its practical effect would be to allow prosecutors to inundate capital sentencing juries with evidence of defendants' likely future dangerousness, while evading *Simmons* by pointing out that the evidence *also* had retributive significance. Respondent cites no state or federal case adopting this highly restrictive standard, and its sole motivation for proposing it appears to

be that under any less grudging interpretation of *Simmons*, the state court's judgment in this case would be impossible to defend.

2. Other states do not rely on a narrow reading of *Simmons*.

South Carolina lists state court decisions that "have identified the prosecutor's express argument of future dangerousness as a necessary trigger for applicability of the [*Simmons*] rule." Brief for Respondent at 20-21, n. 4. To the extent that this list is meant to imply that any appreciable number of other states share South Carolina's reluctance to inform juries about parole ineligibility, the implication is false. Of the nine states represented, all but Pennsylvania now require trial courts to inform capital sentencing juries of the unavailability of parole in every case, regardless of *Simmons'* dangerousness requirement,[1]

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[1] Cal. Penal Code Ann. § 190.3 (West 2001) (jury is given life without possibility of parole as a possible verdict); La. Code Crim. Proc. Ann., Art. 905.6 (West 1997) (same); N.J. Stat. Ann. § 2C:11-3(f) (West Supp. 2000) (jury must be fully instructed on non-capital sentencing alternatives, including parole restrictions); Ohio Rev. Code Ann. § 2929.03 (1999) (jury is given life without possibility of parole as a possible verdict); *State v. Moeller*, 616 N.W.2d 424 (S.D. 2000) (jury given possible sentencing verdict of "life imprisonment without parole"); *People v. Gacho*, 522 N.E.2d 1146, 1166 (Ill. 1988) (instruction required where defendant faces mandatory life without parole sentence if not sentenced to death); Tenn. Code Ann. § 39-13-204(f) (Supp. 2000) (jury is given life without possibility of parole as a possible verdict); N.C. Gen. Stat. § 15A-2002 (2001) ("The judge shall instruct the jury . . . that a sentence of life imprisonment means a sentence of life without parole."); *cf.*

and in most of the cases cited, the jury was so informed, either by instruction or the sentencing verdict itself. Whatever references to *Simmons'* future dangerousness requirement may be found in these cases, the salient fact to be drawn from the practices of American state courts is that South Carolina now stands almost alone in refusing to enlighten capital sentencing juries concerning the meaning of their non-capital sentencing option.

3. The prosecutor invoked both retribution and future dangerousness.

Turning to the prosecutor's argument, the state labors to show that its primary "focus" was retribution, and that the prosecutor did not "expressly raise" dangerousness. Brief for Respondent at 37-44. But this claim, even if it were true, depends on the state's additional contention that future dangerousness can only be put in issue by evidence or argument *that is subject to no other possible interpretation* but that of the defendant's future dangerousness. That this restriction would effectively overrule *Simmons* is illustrated by the facts of this case, in which the state interprets the prosecutor's claim that petitioner was "dangerous" and "more frightening than a serial killer" as an appeal for retribution. Be that as it may, such argument also implicitly invited the jury to protect society against petitioner. Accordingly, *Simmons* entitled him to show that this goal could be achieved by life imprisonment without parole as well as by death.

Commonwealth v. Clark, 710 A.2d 31, 35-37 (Pa. 1998) (upholding denial of *Simmons* instruction).

4. Defense counsel's argument did not remove the need for a no-parole instruction.

The state asserts that defense counsel's seemingly hyperbolic claim that petitioner would "never see the light of day again" if the jury sentenced him to life imprisonment was the equivalent of a no-parole instruction. In *Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263 (2001), this Court squarely rejected the same argument, although there defense counsel's argument was both more emphatic and more specific, 121 S.Ct. at 1273 (" '[h]e will die in prison' "), and although Shafer's jury was instructed (as petitioner's was not) that "life imprisonment means until the death of the offender." *Id.*

Nor does the failure of petitioner's jury to request further instructions about parole distinguish this case from *Simmons*. Brief for Respondent at 47. Just as a jury's question does not convert a constitutional instruction into an unconstitutional one, *Weeks v. Angelone*, 528 U.S. 225, 234-37 (2000), so the absence of a jury request for further instruction does not cure a constitutionally inadequate charge.

5. South Carolina may soon abandon its resistance to the *Simmons* rule.

Although the state suggests that its reluctance to inform sentencing juries of the nonexistence of parole reflects a determination to "remain true" to longstanding state law, Brief for Respondent at 49, South Carolina's judgment on this issue is by no means settled. On May 16, 2001, the South Carolina House of Representatives

approved legislation to require trial judges to read the no-parole provision of S.C. Code § 16-3-20(A) (Cum. Supp. 2000) to capital sentencing juries upon request of either side, and the measure is now pending in the state Senate. H.R. 3819, 113th Leg., 1st Sess. (S.C.). If this legislation becomes law, as now appears likely, South Carolina will finally join the overwhelming majority of death penalty jurisdictions in which sentencing juries are informed of the unavailability of parole for capital murderers whose lives are spared.[2]

6. South Carolina's arguments do not explain its unwillingness to comply with *Simmons*.

The state's brief fills 50 pages, but sheds no light on the most puzzling aspect of South Carolina's dogged resistance to *Simmons*. Why have South Carolina prosecutors gone to so much trouble to avoid letting juries know how the state's legislature has defined life imprisonment? For if (as the state insists) the prosecution's evidence and argument did not lead the jury to assess petitioner's likely future behavior, a *Simmons* instruction would presumably not have affected the jury's deliberations, and the state would have no reason to care whether the instruction was given or not.

In truth, the determination with which South Carolina continues to probe for loopholes in *Simmons* suggests

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[2] Of course, such a change would come too late for defendants like the petitioners in this case and in *Shafer*, *supra*, whose trials were conducted under current South Carolina law, and who must therefore depend on the due process rule of *Simmons* itself.

that it actually agrees with petitioner's view of the realities of capital sentencing. When a jury convicts a defendant of a death-eligible murder, very little further prompting is needed to focus the jury's attention on the danger that defendant may pose in the future if he is allowed to live. And once a sentencing jury focuses on that issue, a death sentence is much more likely if the jury is kept in the dark about its power to protect society by means of a true life imprisonment sentence. The state has no valid interest in increasing the number of death sentences by preserving and exploiting this "false dilemma," *Simmons, supra,* 512 U.S. at 171, and the Court should reverse petitioner's death sentence in such a way as to ensure that this practice does not continue.

CONCLUSION

For the foregoing reasons and those set forth in the Brief for Petitioner, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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